S. HRG. 106–1039

AGRICULTURAL COMPETITION: AN OVERVIEW

HEARING

BEFORE THE

SUBCOMMITTEE ON ANTITRUST,
BUSINESS RIGHTS, AND COMPETITION

OF THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

ONE HUNDRED SIXTH CONGRESS

SECOND SESSION

ON

S. 2252

TO EXAMINE ISSUES RELATED TO COMPETITION AND MERGERS IN THE AGRICULTURAL INDUSTRY, AND RELATED PROPOSALS

SEPTEMBER 28, 2000

Serial No. J–106–110

Printed for the use of the Committee on the Judiciary

U.S. GOVERNMENT PRINTING OFFICE
74–133 WASHINGTON : 2001

For sale by the Superintendent of Documents, U.S. Government Printing Office
Internet: bookstore.gpo.gov Phone: (202) 512–1800 Fax: (202) 512–2250
Mail: Stop SSOP, Washington, DC 20402–0001

COMMITTEE ON THE JUDICIARY

ORRIN G. HATCH, Utah, *Chairman*

STROM THURMOND, South Carolina	PATRICK J. LEAHY, Vermont
CHARLES E. GRASSLEY, Iowa	EDWARD M. KENNEDY, Massachusetts
ARLEN SPECTER, Pennsylvania	JOSEPH R. BIDEN, JR., Delaware
JON KYL, Arizona	HERBERT KOHL, Wisconsin
MIKE DEWINE, Ohio	DIANNE FEINSTEIN, California
JOHN ASHCROFT, Missouri	RUSSELL D. FEINGOLD, Wisconsin
SPENCER ABRAHAM, Michigan	ROBERT G. TORRICELLI, New Jersey
JEFF SESSIONS, Alabama	CHARLES E. SCHUMER, New York
BOB SMITH, New Hampshire	

MANUS COONEY, *Chief Counsel and Staff Director*
BRUCE A. COHEN, *Minority Chief Counsel*

SUBCOMMITTEE ON ANTITRUST, BUSINESS RIGHTS, AND COMPETITION

MIKE DEWINE, Ohio, *Chairman*

ORRIN G. HATCH, Utah	HERBERT KOHL, Wisconsin
ARLEN SPECTER, Pennsylvania	ROBERT G. TORRICELLI, New Jersey
STROM THURMOND, South Carolina	PATRICK J. LEAHY, Vermont

PETE LEVITAS, *Chief Counsel and Staff Director*
JON LEIBOWITZ, *Minority Chief Counsel and Staff Director*

CONTENTS

STATEMENTS OF COMMITTEE MEMBERS

WITNESSES

SUBMISSIONS FOR THE RECORD

AGRICULTURAL COMPETITION: AN OVERVIEW

THURSDAY, SEPTEMBER 28, 2000

U.S. SENATE,
SUBCOMMITTEE ON ANTITRUST, BUSINESS RIGHTS,
AND COMPETITION,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The subcommittee met, pursuant to notice, at 2:18 p.m., in room SD–226, Dirksen Senate Office Building, Hon. Mike DeWine chairman of the committee, presiding.

Also present: Senators Grassley [ex officio], Kohl, Feingold, and Leahy.

Senator DEWINE. Good afternoon, and welcome to the Antitrust, Business Rights, and Competition Subcommittee hearing today on Agricultural Competition. We have a large number of members who wish to make statements today. And Secretary Glickman has another engagement which will require him to leave early. So we are going to conduct this hearing a little bit differently than usual. My plan is to have our Government panel start the hearing before anyone gives any opening statements, including the chairman and the ranking member.

Secretary Glickman will give his opening. We will place Mr. Nannes' opening statement in the record as though read, if that is all right, and then at that point we will conduct a question and answer for this particular panel, and we hope to have the Secretary on his way back to the White House very shortly.

Mr. Secretary.

STATEMENT OF HON. DANIEL GLICKMAN, SECRETARY, U.S. DEPARTMENT OF AGRICULTURE, WASHINGTON, DC, ACCOMPANIED BY MICHAEL DUNN, UNDER SECRETARY, CHARLES RAWLS, GENERAL COUNSEL, U.S. DEPARTMENT OF AGRICULTURE, WASHINGTON, DC; AND JOHN M. NANNES, DEPUTY ASSISTANT ATTORNEY GENERAL, ANTITRUST DIVISION, U.S. DEPARTMENT OF JUSTICE, WASHINGTON, DC

Secretary GLICKMAN. Thank you, Mike, and Senator Kohl, Senator Grassley. It is a great honor to be here with you. As you know, I served on the House Judiciary Committee. I worked with you all. I worked with Chuck Grassley, both on that committee on administrative law issues and farm issues, and I served with you, Mike, of course on that committee. So it is an honor for me to be here. I am joined today by Under Secretary Mike Dunn and General Counsel Charlie Rawls, who can also answer additional questions with me.

This is a very timely statement. I have a written statement which I would ask to appear in the record. I thank Mr. Nannes for his leadership and Joel Klein's leadership in these issues as well.

Consolidation and concentration on agriculture is an extraordinarily critical issue facing agriculture because it threatens the foundation of rural America. The effects of concentration on family farmers and independent producers have been a dominant issue in agricultural policy for some time. Recently, however, rapid transformation in agricultural markets is generating increasing concerns and complaints that family farmers and independent producers, particularly in the livestock industry, do not have open and fair access to those markets. As a result, many small farmers believe they are being forced to compete at a disadvantage.

This consolidation is taking place across broad agricultural sectors: transportation, the grains industry, livestock and even biotechnology. We are addressing these sectors at USDA, and my written statement discusses these. But it is the livestock markets where change has been most dramatic and that appears to give rise to the most publicized complaints and concerns. And I think I can give you a few statistics. The poultry industry is almost completely vertically integrated, with the poultry slaughtering firms owning the birds from breeding through slaughter. Over 60 percent of hogs are now sold through some type of forward sales agreement. Although vertical coordination is less prevalent in the beef industry, forward contracts, marketing agreements and packer feeding account for 17 to 24 percent of the largest packer slaughter since 1988.

Concentration in meat packing is also growing. The four largest packers' share of steer and heifer slaughter rose from 36 percent in 1980 to 81 percent last year—over double in a 20-year period. Concentration in hog slaughter is much lower, but also on the rise, increasing from 32 percent in 1980 to 56 percent in 1999. Four-firm concentration in sheep and lamb slaughter was 68 percent in 1999 and has ranged between 68 and 74 percent in the past 10 years. And there are also similar trends in parts of the dairy industry.

In short, the disappearance of meat-packing plants and firms reduces the number of choices that producers have in the livestock market and increases concerns that the remaining firms may have greater opportunities to engage in anticompetitive and discriminatory behavior. Look at these changes against a decline of almost 350,000 family farms between 1978 and 1997, during which time nonfamily farms increased by 50 percent. And it is no mystery why competition in the agricultural marketplace is a pressing issue for family farmers, as it should be.

The bottom line is that smaller and independent producers fear that accurate price and other market information is not available to them, that forward contracting and other contracting arrangements creates the potential for manipulation of markets and depresses spot-market prices, and that small producers will not be able to find buyers for their livestock.

So how should we, Congress and the administration address these concerns? Obviously, USDA must use all of our own authorities under the Packers and Stockyards Act, which is our statute, to investigate and litigate anticompetitive behavior. Now, realizing

that statute is not like a Clayton or Sherman Act statute, it is basically a price discrimination and anticompetitive behavior statute, but it is one that we have been given for many years.

During my tenure as Secretary, USDA has not shied away from exercising its authority to investigate even the largest companies, including IBP, Excel, ConAgra, Perdue and Farmland, when we thought they might be engaging in anticompetitive behavior. In fact, about 2 weeks after I became Secretary, we sued IBP, alleging preferential pricing practices, where we allege that they favored certain feedlots as opposed to others.

But we cannot do everything that is expected of us in the area of anticompetitive practices without adequate funding for the agency that administers the Packers and Stockyards Act. It is called the Grain Inspection, Packers and Stockyards Administration. In recent years, Congress has frequently provided funding well below the President's budget request. And quite frankly, this level of funding is a substantial impediment to our ability to carry out our statutory functions. In 1994, the Packers and Stockyards program of the Department—Grain Inspection, Packers and Stockyards Administration—had 190 employees. Now, it is 170 employees. So given the nature of what has happened in the industry, the numbers of people we have are about 10 percent less.

As a result of limited appropriations, USDA's Office of General Counsel has had to reduce staffing levels resulting, frankly, in very thin support for this litigation. For example, this week in litigation against one of the Nation's largest packers, that packer had four or five attorneys present in the trial room each day of the proceeding, plus two additional attorneys here in DC. USDA, on the other hand, can afford to dedicate only one attorney full time to that litigation, with another attorney part-time. It is kind of, in a sense, like the movie "Erin Brockovich," in which a small legal firm just could not challenge a large company without additional help. And quite frankly, I think that, given the nature of this problem, we need to sit down with you and examine carefully the help in the long-term future. Now, despite these limitations, we have taken significant steps towards improving our capacity to carry out anticompetitive investigations and enforce our authorities through litigation.

In 1997, at my request, our Office of Inspector General reviewed the Grain Inspection, and Packers and Stockyards program for investigating competitiveness issues under the law. They made a lot of recommendations to us, our OIG. And in line with their recommendations, we restructured our Packers and Stockyards program and reallocated staff to provide economic, statistical and legal resources to investigate very complex competitiveness issues. I would point out as well that OIG's recommendations, as well as the planned reorganization of the Grain Inspection, and Packers and Stockyards Administration closely mirror the recommendations of the recent report by the GAO. Senator Grassley just held a hearing on that issue last week.

So this restructuring has strengthening our ability to investigate these complex cases. In addition, in this fiscal year alone, we generated seven new regulatory initiatives that, among other things, will require swine packers to file contracts with us and mandate

disclosure of specific production contract terms by all packers. Unfortunately, I believe the problems that farmers and ranchers point to in agricultural markets will not yield easily to a simple solution. The U.S. agricultural industry continues to undergo major operational and structural changes—becoming more consolidated, more specialized, more integrated, and more complex and more global.

And the more global you get, in many cases, the more pressure that is put on smaller operators to compete. And then that, of course, responds to the need to lower costs, expand market share and keeping up with competition in an increasingly competitive World Trade environment. But we have got to continue to meet those challenges. And Congress must examine the 79-year-old Packers and Stockyards Act to ensure that it adequately addresses today's market environment.

On some fronts, we need additional statutory authority and, in fact, we have proposed legislation that would provide the Department with administrative enforcement authority over the live poultry dealers and provide the Department with a statutory trust to minimize losses to livestock producers when dealers fail to make payments. These measures would give us additional tools.

More broadly, I believe the Department should be given additional authority to investigate and regulate anticompetitive activities and unfair trade practices in all agricultural commodities. Currently, the Packers and Stockyards Act gives us this authority over packers or live poultry dealers. And the Perishable Agricultural Commodities Act provides for some authority to address unfair trade practices in perishable commodities. We do not have similar authority over unfair trade practices in the markets for other agricultural commodities. This authority, along with the funding to back it up, would greatly improve our ability to protect farmers in a wide range of markets.

Even the Packers and Stockyards Act, however, does not provide authority for us to address the economic sustainability of family farmers and ranchers in rural communities. This is an important point because it also addresses the Justice Department's issues as well. The Packers and Stockyards Act has provisions to prohibit anticompetitive behavior by packers and live poultry dealers. But many small farmers may be at a competitive disadvantage, even when there is no clear evidence of anticompetitive activity or unfair trade practices.

I recognize that several pieces of legislation have been introduced in Congress to deal with these, most notably the Farmers and Ranchers Fair Competition Act introduced by Senators Daschle, Leahy, Kohl and others, and the Agriculture Competition Act introduced by Senator Grassley.

The administration spoke strongly in favor of the concepts in the Daschle bill to Senator Daschle in a letter from White House Chief of Staff John Podesta, in which we agree that current statutes are inadequate to address the issues at hand and that we support the objectives of that bill. I, personally, believe that the socioeconomic impacts of mergers and other consolidations in agricultural markets on family farmers and rural communities are factors that should be addressed by national policy, and national farm policy.

If the desire of this country is to ensure the sustainability of small farms and rural communities in the face of continuing consolidation and agriculture, the current statutes are not sufficient. These issues are not addressed either by USDA's authorities under the Packers and Stockyards or the Department of Justice's authorities under traditional antitrust statutes like the Sherman or Clayton Act.

Current antitrust review does not include socioeconomic issues and is limited to more traditional legal and economic criteria. I do not know the best way to address these nonspecific legal and economic criteria in addressing the other impacts of agricultural mergers or who is best equipped to perform this analysis, whether it is DOJ or the Department of Agriculture or somebody else. But it is my personal judgment that these issues should be examined, these nontraditional economic and legal theories, when the Government considers mergers, especially those issues that adversely affect rural communities by increasing consolidation in agriculture; that is, a merger can be—you can find the competition in the aggregate sense, in the macro sense. But in a variety of micro areas, it may have dramatic impact on small communities and still not meet the tests of our antitrust laws.

So I urge Congress to look at these two pieces of legislation, and work with the administration to find ways to address these issues. If we wish to preserve a diversified producer base and a healthy farm-based rural economy, we must have meaningful tools to support competitive agricultural markets for all producers.

One final note: In addition to the antitrust or anticompetitive statutes, either the Justice administers or we administer. We also have to work to find ways to help farmers be more competitive in the marketplace; that is, it is not enough to just strengthen the antitrust statutes. We have got to help them to have the tools necessary to be competitive. We are looking at those tools. They may be radically expanded use of farmers markets, which are much higher profit for most farmers than traditional agriculture. Then maybe the use of organic marketing, the much more aggressive use of cooperatives and trying to develop cooperatives that can be competitive threats, not so much threats, can be competitive factors to other major companies. But in addition to looking at our antitrust and anticompetition statutes, we have got to figure out ways to help farmers in this new and modern world be strong competitors as well.

But I do think that the people do look at us in the Government to help level the playing field and ensure fair competition for all. And given that, I think your hearing is extremely important and one that maybe can produce a piece of legislation that can provide a venue for some of these other more nontraditional factors to be considered in mergers.

Thank you, Mr. Chairman.

[The prepared statement of Secretary Glickman follows:]

PREPARED STATEMENT OF DANIEL GLICKMAN

I am pleased to be here today to discuss the current trends in agricultural markets and USDA's actions to address concerns about the competitive effect of these trends. Agricultural markets are undergoing rapid transformation, pushed by increasing competition and technological changes.

U.S. agriculture continues to undergo major operational and structural changes—changes in the number of size of farms, where they are located, as well as how and what products are produced. These changes are also going on beyond the farm gate. In essence, the industry is becoming more consolidated, more specialized, more integrated, and more complex.

Consolidated in the agricultural market—that is, the movement from small-scale, relatively independent firms to larger firms that are more tightly aligned across the production and distribution chains—is occurring so that companies can lower their costs, expand their market share by offering new and improved products and, frankly, keep up with their competition in a new, more open trade environment. Those factors effectuating change and change itself are endemic throughout the agricultural community.

This is not a new phenomenon. The rate of change, however, is increasing. Technological advancement combined with continued pressures to increase operating efficiencies and meet customer demands are expected to strengthen the trend toward consolidation. Today I am going to discuss four key sectors of agriculture in various stages of structural change. These sectors are: transportation, grain, biotechnology, and livestock. I will discuss what we at USDA are doing to help the family farmer meet the challenges this change brings.

First, I want to note that USDA is cooperating with other agencies that have jurisdiction over competitive issues in agriculture.

TRANSPORTATION

Rail service is critical to the economic well-being of this nation's agricultural and rural economies. Reliable, cost-effective transportation of agricultural products is essential for U.S. agricultural producers and shippers to maintain competitive viability in domestic and export markets. Nearly half of all grain produced in the United States moves to market by rail. Agricultural shippers pay $3.6 billion annually in freight costs to U.S. railroads.

USDA has watched with mounting concern the consolidation of the Class I railroads the past five years. In 1982, shortly after railroad deregulation, the U.S. rail industry consisted of 32 Class I railroads; today there are only 6 Class I railroads. Four railroads now account for the bulk of Class I traffic in the U.S., with only two major railroads serving the western U.S. and two major Class I railroads serving the eastern United States. The result is that a vast number of locations from which grain is shipped in the United States now have access to only one or two railroads.

The efficiency of the marketing system that connects buyers and sellers of grain in the United States is profoundly influenced by the cost and availability of transportation services to grain producers and shippers. Because inland waterways are not nearby and distances to market are great for most grain produced in the U.S., the cost and availability of rail transportation services greatly affect the efficiency by which grain can be marketed.

THE GRAIN SECTOR

We see acquisitions, mergers, and joint ventures dominating the grain marketing industry. In the U.S. grain market, competition for market share will continue to increase, resulting in grain firms striving for even greater efficiency and productivity. Competition is more intense in the face of current low commodity prices. This alone could explain why we see more mergers and acquisitions to gain economies of scale and take advantage of individual firms' strengths in order to survive. In addition to the recent Cargill acquisition of Continental's grain business, we see joint ventures, such as Harvest States (with an emphasis on originating grain) joining with United Grain Corporation (a well-established exporter) to form United Harvest to market grain out of the Pacific Northwest. A similar arrangement resulted in the establishment of Concourse Grain L.L.C., a joint venture between Farmland Industries and ConAgra, Inc. To market grain out of the Gulf.

Changes in the international markets, especially privatization of importers, also affect U.S. market structure. The shift from government agencies to private buyers typically results in smaller purchases tailored to the specific quality needs of the particular end-user. This, in turn, affects the grain marketing system as companies deal with more complicated logistical issues and new operational challenges. For example, to meet the demands of the new overseas buyer, grain firms must improve their information network concerning the quantity, quality, and timing of demand. They must also expand their capability to segregate and deliver a greater diversity of qualities, including those introduced through biotechnology. Grain firms have also found it necessary to expand their grain cleaning and conditioning capabilities in order to meet the specific quality needs of the overseas buyer.

THE BIOTECHNOLOGY SECTOR

Great changes are also underway in the biotechnology area that are accelerating consolidation in the crop sector. Companies with scientific expertise are merging with those with capital strength and well-established marketing networks. Examples include DuPont's acquisition of Pioneer Hi-bred International Corporation, Monsanto's acquisition of DeKalb Genetics, and Dow Chemical's acquisition of Mycogen Corporation.

Another factor fueling consolidation is the assurance of capturing intellectual property rights associated with DNA modifications. In short, the race is on to identify unique DNA sequences for specific traits before another company can claim ownership. These modifications are essential to ensure consistent quality and provide useful attributes in end products desired by processors and consumers. Before these DNA sequences are commercially viable, they need to be incorporated into the best seed stock available. Thus, an inventory of good seed stock—perhaps acquired through acquisition of seed companies—is critical for biotech companies to succeed and protect the quality of their investment.

While competition and the intense focus on efficiency are not new to either the grain or biotech industries, a new trend is emerging—alliances and partnerships are forming between all marketing segments from seed companies to retailers. Complete supply chain systems are forming by combining input industries, producers, processors, distributors, and even retailers. The systems will be designed to deliver the right quantity and quality of grain at the right time to the processor and ultimately the consumer in an efficient and cost-effective manner.

An example of this is Optimum Quality Grain, a joint venture of the DuPont Company and Pioneer Hi-Bred International, Inc. Optimum has developed a partnership with Iowa State University and Hy-Vee Food Stores, Inc., to produce a low saturated fat oil from Optimum's patented seeds and market a trademarked product called LoSatSoy oil through Hy-Vee Stores. We see other examples of similar market partnerships and alliances both domestically and internationally, and we expect more to follow.

THE LIVESTOCK SECTOR

The most dramatic structural changes in the livestock and poultry industries relate to vertical coordination. The poultry industry is almost completely vertically integrated with poultry slaughtering firms owning the birds from breeding through slaughter. Over 60 percent of hogs are now sold through some type of forward sales agreement. The beef industry has been more resistant to vertical integration and coordination pressures, with forward contracts, marketing agreements, and packer feeding varying between 17 percent to 24 percent of the largest packers' slaughter since 1988. Advances in animal genetics and efficiency factors have contributed to vertical coordination in production and processing functions. The new vertical arrangements also have been associated with shifts in geographic centers of production. In recent years, we have seen hog production increase in the Southeast and South Central regions at the expense of the Midwest.

Increased concentration is another important structural change. Concentration in the meatpacking industry is relatively high and has been growing. The four largest packers' share of steer and heifer slaughter rose from 36 percent in 1980 to 81 percent in 1999. Concentration in hog slaughter is much lower, but also is on the rise, increasing from 32 percent in 1980 to 56 percent in 1999. Four-firm concentration in sheep and lamb slaughter was 68 percent in 1999 and has ranged between 68 percent and 74 percent over the past 10 years. Studies have shown that larger plants and firms enjoy size economies. The disappearance of meatpacking plants and firms reduces the number of choices producers have to sell their livestock and increases concerns that the remaining firms may have greater opportunities to engage in anti-competitive or discriminatory behavior.

The livestock sector, especially the pork industry, continues to see increased horizontal and vertical consolidation. For example, Smithfield Foods, Inc. has purchased a packing plant from Farmland Foods, Inc., located in Dubuque, Iowa. Smithfield also recently completed the acquisition of Murphy Family Farms, previously the largest independently owned hog producer in the Nation. Prior to the acquisition Smithfield was already the Nation's largest hog producer and among the largest hog processors. With the acquisition, Smithfield controls over 12 percent of the sow herd in the United States and potentially will sell a significant number of hogs to other packers.

Producers are concerned about availability of price and other market information, about whether the information and market behavior are conducive to effective price discovery, about the growth of large farming operations and large, integrated proc-

essing firms, and about environmental pressures. In the livestock and meat industry, for example, their concerns include: (1) a lack of public information on prices, other contract terms, and volume of livestock sold through forward sales arrangements (transparency in livestock pricing), (2) thin spot markets and the potential for manipulation of market prices used to pay for livestock sold through forward sales arrangements, (3) difficulty of small producers to find buyers for their livestock, (4) differences in prices packers pay for comparable-quality livestock, (5) concerns about high concentration in meat packing, and (6) that packers could be using packer feeding and forward procurement arrangements to depress spot-market prices.

USDA's actions to address concentration and structural change

On august 31, 1999, USDA signed a Memorandum of Understanding (MOU) with the Department of justice (DOJ) and Federal Trade Commission (FTC). The MOU calls for the three agencies to cooperate on issues related to monitoring competitive conditions in the agricultural marketplace. The agencies will confer regularly to discuss and review law enforcement and regulatory matters to increase each agency's understanding and to improve each agency's effectiveness in carrying out its respective responsibilities.

USDA is concerned about the potential for mergers, market concentration, and structural change to reduce competition in agricultural markets. The Department has taken a number of actions to address these issues.

In the transportation sector, we have undertaken several initiatives to make sure that an adequate level of competition is maintained in those markets and on those routes where competition will likely suffer as a result of consolidation. As railroads merge, they gain additional market power which can be exercised in a manner detrimental to the interest of rural and agricultural shippers. Let me describe how we are working to ensure competition.

While USDA doesn't have direct regulatory oversight over transportation, we are making great contributions on the information front. We are also facilitating discussions on the problems and actions needed to make sure our transportation system meets the agricultural sector's changing needs. As part of our Long-term Agricultural Transportation Strategy, USDA is developing information on the long-term transportation needs of U.S. agriculture for policy makers in the Congress, the Surface Transportation Board, and the U.S. Army Corps of Engineers.

Probably our most visible activity was the National Agricultural Transportation Summit, held in Kansas City in 1998, where we identified 13 long-term challenges facing U.S. agriculture. Since the summit, we have continued to work closely with members of the agricultural community. For example, USDA has initiated a series of "peer-review" meetings with representatives from various farm groups. These meetings have kept us abreast of what the agricultural community is thinking on a wide variety of issues and we'll continue to hold them on a periodic basis. In addition, USDA continues to hold "listening sessions" around the country on agricultural transportation.

We also entered into a Memorandum of Understanding (MOU) with the Surface Transportation Board (STB) to implement the Agricultural Adjustment Act of 1938 and the Agricultural Marketing Act of 1946. In this legislation, Congress directed and authorized the Secretary of Agriculture to participating in proceedings before STB to "assist in improving transportation services and facilities * * * for agricultural products and farm supplies" and to make "complaint or petition to [STB] * * * with respect to rates, charges, tariffs, practices, and service." Congress' and USDA's goal is to ensure that the STB's commissioners are aware of the interests of agricultural shippers as they deliberate and decide the cases before them.

USDA is also concerned about growing concentration in the grain sector. We are monitoring concentration and acting to protect the interests of American agriculture. USDA strongly urged the Department of Justice to review carefully the planned Cargill acquisition of Continental Grain Company's grain trading business to determine whether the acquisition would significantly increase concentration in agriculture and its allied industries, causing potential adverse economic effects on farms and consumers.

USDA experts on production and marketing readily assisted the Department of Justice in its review by providing information and advice. In the end, the Department of Justice took the steps necessary to protect American farmers from the potential adverse effects of the acquisition. The consent decree called for Cargill to divest grain elevators in those market locations where acquisition of Continental's facilities would have limited farmers' choices in marketing their crops. We were very pleased with the DOJ action and look forward to working with the Department in the future to ensure continued protection of America's farmers.

Under our MOU and with DOJ and FTC, we have provided assistance to DOJ on biotechnology mergers and acquisitions. We are also carefully monitoring market developments to determine how biotechnology will influence market structure.

USDA will be working to ensure that our actions, from providing market news to setting grades and standards, continue to facilitate the fair marketing of agricultural products. In fact, USDA will be publishing an Advanced Notice of Proposed Rulemaking in the near future to solicit public comments on how USDA can best facilitate the marketing of agricultural products in today's evolving markets.

Actions addressing anticompetitive practices in livestock marketing

USDA has major responsibility for addressing issues relating to anticompetitive practices and unfair trade practices in the livestock, meatpacking, and poultry industries through its authority under the Packers and Stockyards Act of 1921, as amended (Act). The Act grants the Secretary of Agriculture the authority to regulate interstate and foreign commerce in livestock, livestock products, poultry, and poultry products.

The Act provides that price manipulation, market allocation, and restraint of trade, among other anticompetitive activities, are unlawful. The P&S Act provides the Department with authority to enforce the Act by adjudication or by regulation. As in any regulatory scheme, the Department must have evidence that an activity violates or is likely to violate the Act before it can take action to prohibit or regulate an activity.

USDA has recently undertaken a number of initiatives to promulgate rules designed to promote competition in the livestock and poultry industries and to help family farmers and ensure fair competition.

Proposed new regulations are intended to—

Mandate disclosure of basic contract terms, ensuring that production contracts are easy to understand.

Prohibit restrictions on disclosure of contract terms, preventing packers from imposing restrictions that may limit the ability of producers to obtain legal or financial advice.

Clarify record keeping requirements for packers, specifying the form and content of records that must be maintained to describe livestock procurement transactions to ensure more complete and accurate information.

Prohibit conditional purchases in which the purchase of animals from one seller is tied to the purchase of animals from another seller at an average price, requiring each lot of livestock to be purchased or offered on its own merits.

Require that packers specify the basis on which they pay different prices for like quality livestock.

These proposed regulations, which are based on suggestions from small farmers and ranchers and farm groups, are expected to be published in the Federal Register this year. They will be open for public comment for a period of time before final regulations are issued. Furthermore, the Administration has indicated, through a letter from the Chief of Staff, that it strongly supports the objectives of legislation, such as S. 2411, to strengthen USDA's authorities to address concentration in the livestock sector and enhance information that would level the playing field, particularly for small, family-sized producers.

Initiatives relating to the meatpacking industry

While premerger and acquisition review in the meatpacking industry resides with the Department of Justice and the Federal Trade Commission under the Hart-Scott-Rodino Act, USDA has undertaken a number of initiatives to address issues relating to concentration in meatpacking. The Department completed a major study of concentration (1996) in the red meat industry and formed the Advisory Commission on Agricultural Concentration in 1996. In 1997, USDA's Office of the Inspector General (OIG) reviewed GIPSA's program for investigating competitiveness issues under the Packers and Stockyards Act (P&S Act). OIG recommended that GIPSA place more of its resources in regional offices, obtain additional staff with economic, statistical, and legal backgrounds to investigate anticompetitive practices; and develop procedures to consult with the Office of the General Counsel (OGC) as investigations are initiated and throughout the course of the investigations. In 1998, GIPSA restructured its P&S Programs and reallocated staff to provide economic, statistical, and legal resources to investigate complex competitiveness issues. GIPSA's restructuring has strengthened its capacity to investigate complex competitive, trade practice, and financial issues in the livestock, meat, and poultry industries. We requested additional funds to enhance GIPSA's efforts in this area, and I urge the Congress to fund fully our request in the Agriculture Appropriations bill.

GIPSA has developed rapid response teams to conduct high priority, speedy investigations to prevent or minimize major competitive or financial harm caused by violations of the P&S Act. GIPSA's restructuring has strengthened its capability to investigate complex competitive, trade practice, and financial issues in the livestock, meat, and poultry industries. Since July of 1999, the U.S. Attorney's Office for the Eastern District of Maryland has filed a complaint in United States District Court on behalf of USDA against a leading poultry processor, based on results of an investigation by GIPSA; GIPSA has filed a complaint charging a leading pork packer with engaging in unfair practices in violation of the P&S Act; and GIPSA has filed a complaint charging a major beef packing company with engaging in an unfair practice by retaliating against a feedlot, in violation of the P&S Act.

The Livestock Mandatory Reporting Act of 1999 was enacted as part of the FY2000 Agricultural Appropriation Bill. The Agricultural Marketing Act of 1946 which gives USDA the authority to conduct the existing voluntary market news program was amended to include the Livestock Mandatory Reporting Act. It establishes a program of information regarding the marketing of cattle, swine, lambs, and meat products of such livestock that provides information that can be readily understood by producers, packers, and other market participants, including information with respect to farm and retail-level pricing, contracting for purchase of livestock, and supply and demand conditions for livestock, livestock production, and meat products. Several USDA agencies are involved in implementing these new programs.

The FY 2000 Agricultural Appropriations Act also amended the Packers and Stockyards Act to require that USDA collect information from packers on, and establish a library of, swine packer marketing contracts; obtain information from packers each month indicating what types of contracts are available; and make the information available in a monthly report, along with information on the number of hogs to be delivered under the contracts during the following 6 and 12-month periods. GIPSA is implementing this provision of the Act.

GIPSA has a long history of meeting with the regulated industry and producers to discuss policy issues under the P&S Act. For example, GIPSA has held meetings with hog producers to discuss issues and maintain a meaningful dialogue. GIPSA has sponsored three regional meetings with state departments of agriculture and state attorneys general to find ways to better serve the agricultural community, share and exchange meaningful information, and develop better channels of communication. Last May, GIPSA sponsored a Millennium Conference, attended by over 450 people, which brought together speakers with divergent views in order to enhance public dialogue and debate on structural changes and industry concentration. The Agency has held, and is holding, a series of town hall meetings to discuss issues of concern to poultry growers, producers and processors. The town hall meetings will conclude this fall. USDA sponsored a public forum on September 21 in Denver to discuss issues surrounding captive supplies. The forum provided an opportunity for the public to submit written comments on key issues related to captive supplies, for farm groups to offer evidence on the problems or benefits of captive supplies, and for invited panelists to debate and discuss questions related to the issue. GIPSA is also planning a series of town hall meetings next year to discuss beef and sheep issues. Each of these events offers information about the agency, its function, and industry findings.

In conclusion, USDA is actively monitoring structural changes affecting agricultural producers, is taking steps to address emerging issues effectively and efficiently in the best interests of family farms and all of agriculture and rural communities, and is coordinating these efforts with the Department of Justice and the Federal Trade Commission.

Senator DEWINE. Mr. Secretary, thank you very much. We will operate under the 5-minute rule, and I will start the questions.

And, first, let me thank you for your testimony. I think it is very thought provoking, and these are some very, very obviously difficult questions that we face.

Mr. Secretary, on May 18 of this year, the President signed into law H.R. 434, the Trade and Development Act of the Year 2000, a carousel bill. This bill included a provision which I sponsored, the carousel provision, to improve our ability to enforce the rights of the United States in instances where the WTO member fails to comply with the results of a dispute settlement proceeding.

The expressed intent of the law calls on our U.S. trade representative to rotate the beef and banana retaliation list no later than 30 days after the enactment of the bill. It has now been more than 3 months. No action has been taken by the administration. I believe it is time to implement the rotation. American farmers deserve action.

It is my understanding, as you and I discussed, that when you leave here you will be on your way to the White House. I would ask, and I will send this down, a letter, if you could deliver to the President, and I would also ask you to do what you can to get the administration, your administration, to simply comply with the law. This is something that we tried to get passed for some time. It is WTO compliant. It is the right thing to do. And the bottom line is the WTO is going to mean nothing if we cannot enforce it.

Secretary GLICKMAN. I would be glad to give the letter. I would have to say that, of course, as you know, we won both of those cases, the beef and bananas cases.

Senator DEWINE. We just have to enforce them, Mr. Secretary, or get some results here.

Secretary GLICKMAN. Well, we have begun the process of enforcement. But the carousel decisions have not yet been made. They are complicated issues. USTR is leading the effort here, and I will get your letter to——

Senator DEWINE. I understand. I understand. But you are the administration official I had in front of me today, and I am not going to let this opportunity go without bringing it up because it is very important.

Mr. Nannes, I think the Secretary has answered this question, but I would like for you to respond in regard to the different bills that have been introduced in Congress. Several bills give the Department of Agriculture enforcement power in relation to agriculture mergers. In addition, under these bills, the USDA merger review would focus on whether the merger would be detrimental to family farmers, as opposed to whether it would substantially lessen competition.

Let me ask you, first, do you believe the USDA should have independent enforcement authority over agriculture mergers, and, second, do you believe it is appropriate to change the standard of review—basically, two issues I think we are looking at here today.

Mr. NANNES. Senator, as the Secretary indicated, the administration's position with respect to the bills, as a general matter, is set forth in the letter to Senator Daschle from Chief of Staff John Podesta.

The issues that you and the Secretary referenced with respect to merger jurisdiction ought to be extended to embrace the U.S. Department of Agriculture review of mergers, as well as the traditional Justice Department and Federal Trade Commission review, raise, as he indicated, very substantial issues of policy. As a general matter, as this subcommittee well knows, Section 7 of the Clayton Act is the statute that is applied generally across U.S. industries to determine whether proposed transactions should be enjoined or prohibited because of their adverse affect on the competitive process.

As we have indicated, through a number of enforcement actions that the Department of Justice has taken, in substantial respects, we are able to take into account interests of family farmers that arise in agricultural merger transactions. I think for some time there was some confusion and uncertainty as to whether the antitrust laws would apply, for example, if a proposed merger threatened to lower prices to farmers to noncompetitive levels. And we think we indicated through the Cargill-Continental enforcement action that the antitrust laws do, indeed, apply.

As a general matter then, I think section 7 has worked well. Now, there are some circumstances in which Congress has imposed a different form of merger review before various agencies over time, for varying purposes, usually related to individual circumstances of the industry. And as we go forward to work with the Hill to determine whether these later set of proposals can advance those farm-interest policies, we would expect to consider, in exchange, the kinds of policies that, in the past, have led to the enactment of a different form of merger review.

Senator DEWINE. OK. So we are going to—it is an interesting idea. What is the summary here?

Mr. NANNES. I think the summary is it depends what it looks like. [Laughter.]

Senator DEWINE. We do have two specific bills that have already been introduced.

Mr. NANNES. Right. Yes, sir, that is correct. The bills embody very different standards.

Senator DEWINE. I understand.

Mr. NANNES. Some of the standards in S. 2252 are actually quite analogous to the kinds of factors that we do take into account presently in our merger review, effect on price and effect on market power, for example.

The other bill adopts a standard that is quite different from that ordinarily applied in the merger context, and the exact manner in which that would be applied would be dependent on the enforcement action that the Agriculture Department would take if that statute were enacted.

Senator DEWINE. Senator Kohl.

Senator KOHL. Thank you, Mr. Chairman.

Mr. Secretary, as you well know, over the past several decades, in most every sector of the American economy, American business, efficiency has been rewarded in the marketplace. And efficiency is oftentimes accompanied by bigness, whether it be in the retail business. And we have seen these huge department store chains proliferate themselves across the country—Wal-Mart is just one example—by delivering a bigger, better product at a better price with more efficiency. And, as a result, smaller businesses were unable to resist that competition all over the country. And this has happened in so many different industries. And obviously we are now seeing the country swept by a similar occurrence in agriculture. And it puts the small farm at an extreme disadvantage, which you point out.

And my concern is whether or not there is an inevitability about this, and if there is, whether there is some intervention that is justified and necessary under the philosophy of rural America and the

desire on the part of many people, and maybe government, to see that rural America does not just atrophy entirely. As you know, there are other countries that do adopt that kind of a philosophy and do significant things to sustain their rural economy, and it is understood, and it is built in the Government philosophy, and it has stood the test of scrutiny by the populace, and they just do it. And I do not think they have arrived at that nor, perhaps, will we, but should we? Or is there any way short of—and this is my question—in your opinion, and it is only an opinion, any way short of a direct policy by the Government to do things to sustain rural America and small agriculture, small farmer agriculture? Short of that, do you see a continuation of what has occurred over the past several decades? And you know if it occurs in only one more decade or two more decades, we will not have to talk about it because the small farmer in America will be gone. And whatever ramifications that has on rural economy will have happened, and there will not be much to talk about.

So what is your thought?

Secretary GLICKMAN. That is the $64 million question. And let me give you one more variation on this theme. We have a research establishment of over a billion dollars a year in spending that has as its goal to increase productivity, to increase yields, to increase the amount of units per whether it is bushels of corn or pounds of cotton or whatever else and lowering the costs. So it is ironic that part of the reason why agriculture is so dramatically successful is because it is productive because of the historical research arm of Government, which, in a sense, has created a lot of the problems that we are in. And we are not going to stop the research, nor are we going to turn back the economy. We are fundamentally in a market-based economy, and we are not going to go to a centrally planned economy in this country.

Now, saying that, we have done those things in the past. When we regulated the airline industry, we preserved certain routes to small towns under the theory that underserved areas could not compete no matter what you did. So we regulated those through a variety of public utility type of arrangements.

In agriculture, I would say we have got to do a couple of things. If we do nothing, the tide will continue. And I do not know if it is going to go all the way down to six farmers in the country. I doubt that. But I do believe that the tide will continue, the trends will continue unless we do something. So a couple of things: One is that we do have to examine the antitrust laws to make sure that we have the people power there to enforce the statutes. And I think we need more people power in my particular Agency, and I also think the statutes need to be augmented, and giving them more purpose and more specific enforcement authority. And I have listed some of those specific suggestions in there. And I think that will help us some.

I think that too often the outside world in agriculture really does not have much fear of the Government when it comes to enforcement of antitrust and anticompetitive statute laws because we do not have the muscle behind it. And I think we need to put more muscle behind it, and I think that would help balance this issue a little bit.

And I think that farm programs have been one of the levelers here; that is, we provide a lot of money out there for our farmers and ranchers and a lot of programs which we do not provide a lot of other sectors of the economy. And the reason why we do it is we believe that rural America has to be preserved, and that is the route we have gone down, is these farm programs since the 1930's. While they have not stopped the decline of agriculture, it has clearly slowed down, if you look over 60 or 70 years, the exodus from farming. And we have kept an awful lot of people in rural America as a result of these programs. But it certainly has not stopped it at all. And we cannot answer all of this through the antitrust laws. A lot of it is going to have to be answered affirmatively through farm programs and rural programs.

But I do think that the concepts in these two bills, and I am not endorsing either one of them, the concepts of looking at factors, other than traditional legal or economic issues as we look at mergers, is something that is going to have to be a bigger place in our antitrust review.

Senator KOHL. Thank you.

Mr. Nannes, as you know, under the so-called section 271 process, when a local phone company seeks to enter the long distance market, it must file both with the FCC and the Justice Department. The Justice Department then gives the FCC an advisory opinion as to whether the local phone company has opened up its facilities to competition in the State at issue. According to almost everyone, this process seems to be working well in the telecom industry.

In light of this experience, why should we not create a similar process with respect to agriculture? A process in which the Agricultural Department could issue an advisory opinion as to whether an agriculture merger is likely to harm competition in agriculture and its effect on farmers. I am interested in your opinion, Mr. Nannes, and your opinion, Secretary Glickman.

Mr. NANNES. Certainly, Senator, I would be happy to respond.

First of all, I would note that the Department of Justice and the Federal Trade Commission have a Memorandum of Understanding with the Department of Agriculture, which was entered into last year, and basically just formalized what has been a longstanding process of cooperation between the two agencies. So as a practical matter, whenever there is a merger or acquisition that affects important agricultural interests, we do have communications with the Department of Agriculture. And there have been many instances in which the Department has been extraordinarily helpful in helping us reach the proper antitrust judgments.

With respect to the analogies to certain other regulatory agencies, the only thing I would point out to you that I think is an historical explanation is that a lot of the agencies that have jurisdiction to review mergers are agencies that were established, oh, 50, 60, 70 years ago to pervasively regulate the particular industries at issue. And so if you had a situation where an agency, like the old Civil Aeronautics Board was regulating airline fares and was controlling entry and exit into airline markets, it made some sense at that time to give the CAB jurisdiction over merger review.

But as industries have moved further toward deregulation, the general trend has been to contract regulatory agency review of mergers and acquisitions and transfer that to the Department of Justice and the Federal Trade Commission. And, frankly, even those agencies that have merger review retained under their public interest standards, have tended to move in the direction of encompassing and applying the same kinds of merger standards that have now been developed and applied under the Clayton Act by the Justice Department, the Federal Trade Commission and the courts.

Secretary GLICKMAN. I would say that, in light of what Mr. Nannes said, I want to say that USDA has provided assistance to Department of Justice in a number of investigations or merger reviews. The relationship is much better and much more formalized than it probably has ever been. So that standpoint is good. And whether it is on the grain mergers or biotechnology consolidations or other things. I mean, we do have that now.

I do think it is appropriate to figure out whether you think it is appropriate for you to formalize this in some way. But from a practical matter, that cooperation is occurring right now.

Senator KOHL. Thank you, Mr. Chairman.

Senator DEWINE. Senator Leahy.

Senator LEAHY. I am not a member of the subcommittee.

Senator DEWINE. I thought we would go to you, Pat, and then we will go to Chuck.

Senator LEAHY. Thank you. First off, Chairman DeWine, I want to thank you for holding this hearing and Senator Kohl. The question of concentration and competition in agriculture is an extremely important one, and it is a very current one. In my own State of Vermont, agriculture is one of our predominant industries. And so it is, of course, of vital importance to my State. It is also important to States like Ohio, with a strong agricultural basis, or Wisconsin, where dairy is also king, as it is in Vermont, or in Senator Grassley's State.

The point is while the members of this committee do not agree on all aspects of our dairy policy, we all stand united with our dairy producers, and we stand united in trying to find solutions that support family farms, whether they are raising corn or wheat or cattle or rice or whatever it might be. Senator Kohl is doing a tremendous job for dairy farmers in the agricultural appropriations bill. His recent effort is going to benefit all of the dairy farmers.

Senator Feingold and I have been working, and the GAO, on a study on retail milk pricing, how to get more of that price to our farmers. I will sponsor a bill that he is introducing today, along with Senator Jeffords, to create a Commission, to study ways to improve the viability of family-size dairy farmers.

Senator Kohl mentioned earlier that he and I sent a letter today to both the Attorney General and to the chairman of the Federal Trade Commission. What we have done is we have called for an immediate investigation of possible market abuses by the dairy processing and retail marketing industries. We know that our farmers are not getting their fair share of the retail price of milk, but some giant corporate processors are raking in windfall profits as they raise prices to consumers in New England. We find this relating to Suiza Foods of Texas. They have taken over so much of the busi-

ness, they make the profit, we pay the cost, and our farmers do not get a return. I mean, it is great for them, it is bad for everybody else. They control almost 70 percent of the milk supply in New England. They are buying up local dairies. Once they buy them up, they then close them down. This happened in Kentucky, and the Justice Department went after them in Kentucky.

I would like to put in the record, Mr. Chairman, an editorial from the Rutland Daily Herald entitled, "Milk Monopoly."

Senator DEWINE. We will make that a part of the record.

Senator LEAHY. Thank you.

[The Rutland Daily Herald article of Senator Leahy follows:]

The Rutland Herald Online -

Print Close

Milk monopoly

April 4, 2000

(from the *Editorials* section)

Suiza Food Corp. is now the target of an antitrust investigation by the attorneys general of Vermont, Massachusetts, and Connecticut. The Texas-based company now controls 70 percent of the milk market in New England, which ought to worry farmers and consumers alike.

Suiza has been buying up milk-processing plants in New England and closing some of them down. The result is a growing monopoly on the handling of milk. Farmers have fewer places to sell their milk, and consumers have fewer sources from which to buy milk. The result could be bad for both.

Farmers in New England enjoy a buffer against excessively low prices because the Northeast Dairy Compact forces dairy processors to pay a premium when prices sink below a floor. Suiza, among others, has opposed legislation authorizing the compact, and the company resisted paying the premium price when it came time to do so.

But consider the vulnerability of dairy farmers if the compact did not exist. Floods of milk from large corporate-owned farms, particularly in California, have created surpluses that have driven the prices received by farmers down to historic lows. Suiza would be more than happy to pay that low price. The great advantage to dairy processors when prices fall is that they continue to charge high prices in selling to retailers. Profit margins to processors are fattest when farmers are suffering the most.

With competition nearly eliminated in New England, competitive pressure to keep retail prices down will also vanish.

Recent discussions of the dairy industry and its problems have put the spotlight on the nation's Depression-era system of market orders, which are portrayed as a clumsy and costly anachronism. As the news stories frequently point out, federal prices are set by region according to the farmers' distance from Eau Claire, Wis.

The purpose of this policy, adopted in the 1930s, was to ensure that the diverse regions of the country - not just the dairy belt of the upper Midwest - could support a local dairy industry. Consumers require fresh locally produced milk, and regional pricing was a way to make sure that dairy farming survived from Florida to California.

There is still something to be said for a pricing system that allows dairy farming to survive throughout the nation. To consolidate the dairy industry into the hands of a few big corporations based in Texas or California would have a variety of bad effects.

For one thing, dairying is woven into the fabric of vast regions of rural America. Local dairy farms producing for local regions guarantee fresh products but also survival for rural economies.

Suiza and other large corporations will continue to side with the dairy farmers of the upper Midwest in opposition to the continuation of the dairy compact. Indeed, survival of the compact will never be secure as long as farmers in Wisconsin and its neighbors face dangerously depressed prices. The answer is not to destroy the institution that helps New England farmers to survive. The answer is to give Midwestern farmers help in gaining a decent price.

The dairy industry is at a crossroads. Down one road the family farm will continue to provide wholesome products for regional markets. Down the other industrialized agriculture will take over, and corporate monopolies will truck in milk from wherever they please and charge whatever they like.

The antitrust investigation of Suiza, which came at the urging of Sen. Patrick Leahy, ought to provide a look at how one company has tightened its grip on a whole industry in New England. Vermont's dairy farmers will be watching with interest as that investigation proceeds.

Senator LEAHY. We believe the Justice Department should investigate why lower farm prices for milk have now been passed on to the consumer. The farmer is getting less, the consumer is paying more, somebody is getting it. We are not benefiting by it as consumers. The farmers who produce the milk certainly are not benefiting by it. I do not want all of the profits to be going in some corporate board room somewhere way outside of our region.

I think about when we debated the landmark Sherman Antitrust Act, born a century ago, Senator John Sherman attacked that "kingly prerogative of those with concentrated powers. We will not endure a king over the production, transportation and sale of any of the necessities of life." But that seems to be happening.

And I would hope that we can get our bill enacted so the large processing giants who seem to be getting richer and richer as more and more of our farmers are driven into the dirt, that that situation might stop. Processors who cheat farmers out of a fair chance to compete on a level playing field, they should be looked at. I do not mean to get on a soap box on this, but our farmers and ranchers are the best in the world, but they ought to be able to compete on a level playing field. If you are out there working 7 days a week, you are producing the best and least-expensive food and fiber that any country can look at, you ought to get some return for that. It is important to every one of us.

Secretary Glickman, the White House letter supporting the Daschle-Leahy Bill S. 2411 states, "While USDA has taken a number of actions to ensure a more level playing field for farmers and ranchers, more needs to be done." It says that S. 2411 would "strengthen the ability of the Department of Agriculture to address the adverse effects of unfair, deceptive and anticompetitive practices on family farmers and ranchers and take into consideration the dire circumstances of many rural communities and farms."

It also notes the examination of mergers that you would perform, which would be of a very nature from those that the Justice Department does. You would look at basically the possible adverse effects on the affected communities and farmers and ranchers.

Now, do you think this role, I mean, the special role that would go to the Department of Agriculture, sort of a supplementary role to the Department of Justice, would this be helpful in preserving family farms and ranches from possible anticompetitive activities, whether they are in Ohio, Iowa or anywhere else?

Secretary GLICKMAN. Well, I think the letter speaks for itself. My own view is that there needs to be a role for USDA to input the process. Now, as I have said, Justice and I, for the first time, have exercised a much more formal role than we ever have before. And, in fact, they have taken our advice on several issues as a result of some of these mergers, Continental-Cargill for one, but there have been others as well.

I think this is as much a policy question for the Justice Department as it is for me. Because in some of the areas, like railroad mergers or airline mergers, we have gone the other way, and we have given the Justice Department the prime—at least airline mergers—the prime responsibility. Railroad mergers are still somewhat different.

The problem I have is the antitrust laws have a standard which does not take into account the actual competitive effects that occur out there in the countryside. The standards are long, and historical and involve just a monumental amount of case law on legal and economic theories of consolidation and concentration. And I guess my point is there are other factors to be considered. They are not all traditional antitrust factors. And somehow we have got to memorialize that input process. And right now I think we are doing quite well. But you have to decide working, and we will work together with you, as to whether that needs to be formalized in a different legislative way of doing business.

Now, in addition to that, we need some additional authorities on the Packers and Stockyards Act that we do not have. And we will get you all of that information that you need. And we need more enforcement power and muscle in the statutes that we administer.

Senator LEAHY. Thank you.

Senator DEWINE. Senator Grassley.

Senator GRASSLEY. I want to preface my remarks and do it through the work of my subcommittee in receiving a recent General Accounting Office report on how effective the enforcement of the Packers and Stockyards Act has been. That report said that, while GIPSA has broad investigative, enforcement, and rule-making powers, it has not really pursued any of these avenues to any great extent to protect producers in the cattle and hog industries.

The report also found that GIPSA has serious organizational, procedural and expertise problems, which have substantially impeded its ability to effectively perform its competition responsibility.

And there was a General Accounting Office report in 1991 that said that GIPSA needed to enhance its competition activities and regulations because of changes that were going on in the livestock market. Probably those changes have even been greater since 1991.

And then we also had, in 1997, the U.S. Department of Agriculture's own inspector general identify in an internal report very specific organizational and expertise problems which needed to be addressed so that GIPSA could perform its responsibilities in a competent manner.

But this latest GAO report found that the USDA had not addressed the problems or implemented the recommendations in these two previous reports. I would like to demonstrate from the chart here contained in this recent GAO report, that on the recommendations that were contained in the 1997 OIG report, only one has completely been addressed, and five still must be completed. And the General Accounting Office testified that these five are core issues that must be addressed before the Department can effectively investigate and pursue competition-related cases.

So the GAO report found that the USDA has fundamental problems. Yet at my hearing on Monday, the answers from your Department to my questions on why these things have not been done enough, although there was a lot of acceptance of the recommendations of the GAO to address these concerns, your answers were based on claims that the U.S. Department of Agriculture, GIPSA and the Office of General Counsel funding requests were not granted.

Well, I have had a chance since that hearing to look a little more closely at these funding requests and the amounts that Congress has appropriated. What I have found is that Congress has increased appropriations for USDA, GIPSA and OGC almost every year since 1991. I have also found that many of GIPSA's requests that USDA earmarked specifically for competition-related activities were granted in full by Congress. For example, in fiscal year 2000, GIPSA asked for a $636,000 increase in its budget for work related to livestock competition and industry structure, which was included then in the appropriations act.

But what I also noted was that competition-related requests do not appear to be highlighted as a priority for the USDA. The Office of General Counsel appears to have never specifically requested attorneys for the Packers and Stockyards Act. And my evidence here is based upon the analyses of the requests by the General Accounting Office and the Congressional Research Service. In fact, antitrust law lawyers, and I want to emphasize antitrust lawyers, have never been identified as a priority need in your requests at all. The U.S. Department of Agriculture, itself, admits attorneys dedicated to the Packers and Stockyards activities have declined from eight to five—that would be almost a 40-percent decrease in staff—but we did not cut your budget by 40 percent.

So why have you not specifically asked for antitrust lawyers for Packers and Stockyards competition-related activity? And I want to distinguish between competition work, where antitrust lawyers are very important, and people who can give legal advice, as opposed to lawyers who might work in other aspects of GIPSA under Packers and Stockyards Act not related to competition matter.

Lastly, how come USDA testified at my hearing that you need five attorneys to conduct your Packers and Stockyards competition-related work, yet the USDA's fiscal year 2001 requests, no legal services were specifically identified for Packers and Stockyards competition-related work?

Secretary GLICKMAN. First of all, let me say this is one of the first areas I have ever been involved in my years in Congress or my years here, where there was a great demand for more lawyers in the Government. [Laughter.]

However——

Senator GRASSLEY. Quite unusual.

Secretary GLICKMAN. This is the right committee to talk about that to. But I would have to say this, that I think the GAO did identify properly the point that in order to bring enforcement-type cases, you have got to have enforcement-type lawyers there. And that——

Senator GRASSLEY. And at the very beginning.

Secretary GLICKMAN. And by and large, the Packers and Stockyards Act has been viewed as a competition and a law that looked at economic market power and at price discrimination-type of issues. And quite frankly, it did not have the philosophy or the organization like the Antitrust Department that the Justice Department has.

Now, the fact is that we do need more of that philosophical perspective to bring the kinds of cases under our statute, in order to effectively move ahead on some of the things that we are doing.

And the GAO report properly, I think, identified things that we need to do, and we have accepted that. Now, the truth of the matter is, if you look back over the last 5 or 6 years, we can probably play the game of who asks for much, how much, how much did you give us back and forth. None of us asked for a lot, Congress or the administration.

Senator GRASSLEY. But not for antitrust activity.

Secretary GLICKMAN. But if you look at 1996, 1997, 1998 and 1999, in all 4 years, the budget request was significantly greater than the amount received. In the year 2000, you gave us everything we asked. Now, I am not talking about how it was allocated, but you gave us everything that we asked. And we have asked for about $4.5 million more this year than we did last year.

Senator GRASSLEY. I do not dispute any of that.

Secretary GLICKMAN. The point, however, is that competition under the Packers and Stockyards Act is not a line item in the USDA budget—maybe it should be. I think the GAO has identified some areas where we can have attorneys involved at the incipiency or the beginning of an Agency investigation of anticompetitive practices. And I think that is the heart of what you are saying.

Senator GRASSLEY. Yes.

Secretary GLICKMAN. Is to organize ourselves more aggressively in an antitrust-type mode. I do not know if our general counsel would have any comments on this, but I take what you are saying there. I do think it relates to the perspective that, by and large, USDA, in Packers and Stockyards, has not been viewed as an antitrust agency, and that is basically the function of the Justice Department. But I think that we can, and should, become more responsive in terms of being on the cutting edge of some of these investigations.

I would like to know if our general counsel could make a quick comment on this for a moment.

Senator DEWINE. If you could identify yourself for the record.

Mr. RAWLS. Mr. Chairman, I am Charlie Rawls, general counsel for USDA.

I think the point I would like to stress is that within the Office of General Counsel we have been struggling to maintain what I will call our base program, our base lawyers to do all of the work across the Department. In fiscal year 1995, we had 250 lawyers; in fiscal year 2000, we have 222. Through attrition, we simply are not back-filling positions in order to keep our budget balanced.

I would agree with Senator Grassley, to the extent that he is concerned that we have not specifically identified in our budget the need for lawyers particularly to address concentration and trade practices. That will be done in our next budget, I would tell you. The budgeting is done, I think as I mentioned in a hearing earlier this week, nearly 2 years in advance when we submit our budget notes and so on. This is a critical need. I want to agree with Senator Grassley, in any way possible, if he will help us get some more lawyers to do this work. [Laughter.]

Senator DEWINE. Well, Senator?

Senator GRASSLEY. If I am part of the problem, I will have to help you. [Laughter.]

What I want you to do, though, and this will be my last statement because I have used my time up, the document I used, the fiscal year 2001 Budget Explanatory notes for the USDA Office of the General Counsel, regarding whether or not lawyers and antitrust are a priority in your Department, and that is what I am challenging is that in one place you ask for Civil Rights Division, nine lawyers; Natural Resources Division, one lawyer; Regulatory Division, one lawyer; Central Region, one lawyer; Pacific Region, one lawyer; and that. So there is, even though it might not be a line item in the budget, there are documentations coming from your Department that say where you want lawyers and where you do not want lawyers. And I guess I am just challenging you, when you say USDA makes a commitment to antitrust or to this type of competition enforcement, because it takes lawyers to do the job right. Also, the lawyers only get involved in the seventh or eighth step of the process, and they need to be involved in the first and second step.

Secretary GLICKMAN. I agree with you. And I think you have done us a great service here.

Senator GRASSLEY. Thank you.

Secretary GLICKMAN. I really do.

Senator DEWINE. Senator Feingold.

Senator FEINGOLD. Thank you, Mr. Chairman.

First, Secretary Glickman, let me just say how much I have enjoyed working with you. You have listened. You have listened here in Washington. You have come to Wisconsin to listen. You even listened to me once when I was harassing you about dairy policy in the streets of Jerusalem, which is quite patient of you, and I appreciate it. We have not always agreed, but it has been an excellent opportunity to work with a public servant who is a good communicator.

Mr. Chairman, I travel to each of Wisconsin's 72 counties each year. I actually do hear countless stories about how market concentration and vertical integration in agriculture have taken away farmers' ability to negotiate a fair price in the marketplace. Farmers tell me that this loss of bargaining power forces them to accept painfully low prices for their products, and I want to commend Senators DeWine and Kohl for holding this hearing and bringing attention to this important issue.

I know that Senator Kohl hears the same concerns as he travels around our great State. His leadership in agriculture, and particularly on dairy issues, is appreciated not only by me, but I can assure you by every single Wisconsinite.

And I also want to commend Senator Daschle, who I see in the room, and Senator Leahy, who was here before, for their leadership and especially for introducing the Farmer and Ranchers Fair Competition Act. I think this is one of the most important bills that has been introduced around here in many years in this area. And Senator Leahy is right. We do have our differences regionally. But we are finding ways to work together on behalf of dairy farmers and farmers all across the country. So I am proud to co-sponsor their legislation, to strengthen existing antitrust laws, and that at the same time ensures that farmers have sufficient marketing opportunities for their agricultural products.

Over the past 70 years, America's agriculture sector has, of course, trended toward fewer and larger operations. As U.S. farms have consolidated, their numbers have declined unbelievably from nearly 7 million in the 1930's to 2.2 million in 1998. And, of course, for those of us from the Upper Midwest, of particular concern, and in the dairy industry across America, are the mergers and the retail processing and co-op sectors which have taken the bargaining power away from the individual dairy farmer. And this is why I am so pleased to hear Secretary Glickman's candid acknowledgment that the current laws do not necessarily take into account the broader concepts and the other effects of anticompetitive behavior that may not be encompassed in the current antitrust laws.

Merger mania has run rampant through the retail market. The Nation's grocery leader, Albertson's, operates nearly 2,500 stores in 37 States. Together, the top four grocery companies sell more than one-fourth of all of the groceries in the United States. This layer of concentration builds on the already concentrated dairy market, where Suiza and Dean Foods dominate their respective milk markets.

The impact of these concentrated layers of the dairy sector is simple. They have taken much of the bargaining power away from the farmer and caused the farmers' share of the retail dollar to simply crumble. USDA analysis revealed that retailers were receiving an astronomical 70 cents per gallon in 1992, when the store price for milk was $2.78. That amounts to about $8 and 14 percent per hundred weight. And guess what? This price is equal to the price dairy farmers are being paid for their milk today. This is an outrage.

The situation now is even worse. USDA announced in June of this year that the farm retail price spread for dairy food has now doubled since the early 1980's. At a time when dairy prices have stayed in the stores, dairy farmers are receiving 1978 prices for their milk. The concentration in the dairy industry is acting like a brick wall between the farmer and the consumer. Consumers are paying more, while farmers are receiving less.

The National Commission on Small Farms reported that the Dairy Department produced the highest profit-to-space ratio in the supermarket, number one. More than twice as much as the next most profitable department, which is frozen foods. So why then are dairy producers being paid less when retailers are charging consumers more?

In order to answer this question, as Senator Leahy indicated, he and I have asked the General Accounting Office to investigate the increasing disparity between the prices farmers receive for their milk and the price retail stores charge for their milk. But we must also do more. We need to enact proactive policies to help farmers gain full access to the marketplace and weave through this increasingly consolidated market. In order to accomplish this goal today, I have authored and joined with Senators Leahy, Jeffords and Kohl to introduce a bill to establish the Dairy Farmer Viability Commission to make recommendations on how the Federal Government could fashion policies, programs and partnerships to address the growing levels of market concentration in the dairy industry.

Mr. Chairman, as you know, this country is in grave danger of losing its independent producers, hog producers, cattlemen, dairy producers, soybean farmers and others. And we are in danger of losing a rich tradition of losing the capacity to honor and reward generations of hard work and love of the land. We must enable all producers to have a fair shot at the marketplace, and we have to be mindful of the human consequences for our country if we fail to do that and if we fail to do it soon.

So, Mr. Secretary, let me just ask you one question. What steps could Congress take to be able to particularly address the concentration in the dairy industry in order to help the dairy farmer get a larger share of the retail dollar?

Secretary GLICKMAN. Well, in the first place, we support this GAO study that you are doing. I think that it is interesting, there is a lot of competition among food retailers in the area, but it does not seem to affect retail milk prices very much. It is an interesting phenomenon. And that is kind of a nonscientific answer. But there is fairly extensive competition overall, when you consider retail competition, even with companies like the large ones you have talked about. So the GAO identifying those factors that affect those factors that affect the farm-to-retail price spread I think will be helpful to us as well.

I cannot speak to whether there are any cases pending in this area beyond what has already been mentioned publicly. But, again, I think that is one of our roles—us and Justice—is to be vigilant in terms of those parts of the economy where concentration is having an adverse market impact on either producers or consumers. It is a tough area.

You mention one interesting point, and that is the issue of bargaining power and clout. Farmers probably, in the process of bargaining price for their product, have less clout than any other sector of the American economy. And, of course, you are dealing with a perishable. So it makes it so that the clout is even less because they have to dispose of the products so imminently. Now, the cooperatives formed as a way to try to deal with that issue. Cooperatives do a good job in some areas. Sometimes, however, they operate like large corporate entities as well. And I think another thing that we probably need to look at, and I probably risk opening my mouth in this area, is how cooperatives have been handling their part of the bargain, as it deals with the historic roles of providing additional bargaining clout for farmers.

Senator FEINGOLD. Thank you very much, Mr. Glickman.

Senator DEWINE. Mr. Secretary, we thank you very much. We will let you get on to the Cabinet meeting, and we appreciate the testimony from the other witnesses.

And, again, just on one personal note, do not forget carousel.

Secretary GLICKMAN. I will not.

Senator DEWINE. I know you all will do the right thing.

Secretary GLICKMAN. Do we have the letter? Did somebody pick up the letter? OK.

Senator DEWINE. We have got your letter to you. Thank you, sir, very much. Good to see you.

[The prepared statement of Mr. Nannes follows:]

PREPARED STATEMENT OF JOHN M. NANNES

Good afternoon, Mr. Chairman and members of the Subcommittee. I am pleased to have the opportunity to discuss issues relating to antitrust enforcement in the agricultural marketplace.

We know that the agricultural marketplace is undergoing significant change. Farmers are adjusting to challenges in international markets, major technological and biological changes in the products they buy and sell, and new forms of business relationships between producers and processors.

In the midst of these changes, farmers have expressed concern about the level of competitiveness in agricultural markets. Farmers know that competition at all levels in the production process leads to better quality, more innovation, and competitive prices. They know, too, how important antitrust enforcement is to assuring competitive markets. Enforcement of antitrust laws can benefit farmers in their capacity as purchasers of goods and services that allow them to grow crops and raise livestock and also in their capacity as sellers of crop and livestock to feed people not only in our country but also throughout the world.

The Antitrust Division takes these concerns seriously and has been very active in enforcing the antitrust laws in the agricultural sector. During the past two years alone, the Antitrust Division has challenged a number of significant mergers that would have affected agricultural markets, such as:

The proposed acquisition by Monsanto of DeKalb Genetics Corporation, which would have significantly reduced competition in corn seed biotechnology innovation to the detriment of farmers;

The proposed acquisition by Cargill of Continental's grain business, which would have significantly reduced competition in the purchase of grain and soybeans from farmers in various local and regional markets;

The proposed acquisition by New Holland of Case, which would have significantly reduced competition in the sale of tractors and hay tools to farmers; and

The proposed acquisition by Monsanto of Delta & Pine Land, which would have significantly reduced competition in cotton seed biotechnology to the detriment of farmers.

During the same period, the Antitrust Division also criminally prosecuted companies that had fixed prices for products purchased by farmers—lysine and vitamins—and secured numerous criminal convictions and the highest fines in antitrust history.

These enforcement actions demonstrate that the Antitrust Division is committed to enforcing the antitrust laws in the agricultural marketplace.

I. MERGER ENFORCEMENT

In our conversations with farm groups, we have found that farmers are especially concerned about the potential impact of mergers and acquisitions ("mergers"). Farmers are concerned that mergers will limit the number of sellers of seed, chemicals, machinery, and other equipment from whom they have to buy and will limit the number of customers for crops and livestock to whom they can sell. For this reason, I think it may be helpful today to start with a discussion of the Antitrust Division's merger enforcement program, with particular emphasis on recent merger enforcement actions that the Antitrust Division has taken in the agricultural sector.

A. Merger Enforcement Standards

The antitrust laws prohibit the acquisition of stock or assets if "the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly." This enables us to arrest anticompetitive mergers in their incipiency, to forestall harm that would otherwise ensure but be difficult to undo after the parties have consummated a merger. Thus, merger enforcement standards are forward-looking and, while the Antitrust Division often considers historic performance in an industry, the primary focus is to determine the likely competitive effects of a proposed merger in the future.

The Antitrust Division shares merger enforcement responsibility with the Federal Trade Commission ("FTC"), with the exception of certain industries in which the FTC's jurisdiction is limited by statute. The agencies jointly have developed Horizontal Merger Guidelines that describe the inquiry they will follow in analyzing mergers. "The unifying theme of he Guidelines is that mergers should not be permitted to create or enhance market power or to facilitate its exercise. Market power to a seller is the ability profitably to maintain prices above competitive levels for a significant period of time." Merger Guidelines § 0.1.

We ordinarily seek to define the relevant markets in which the parties to a merger compete and then determine whether the merger would be likely to lessen com-

petition substantially in those markets. In performing this analysis, the Antitrust Division and the FTC consider both the post-merger market concentration and the increase in concentration resulting from the merger. The Antitrust Division is likely to challenge a transaction that results in a substantial increase in concentration in a market that is already highly concentrated, although appropriate consideration will be given to other factors, such as the likelihood of entry by new competitors, that could affect whether the merger is likely to create or enhance market power or facilitate its exercise.

In most instances, the Antitrust Division is concerned about the ability of the merging companies to raise above the competitive level the price of the products or services they sell. Of course, it is also possible that a merger will substantially lessen competition with respect to the price that the merging companies pay to purchase products. This is a matter of particular concern to farmers, who often sell their products to large agribusinesses. For a while, there seems to have been some uncertainty about whether the antitrust enforcement agencies take this possibility into account when analyzing mergers. In fact, the Merger Guidelines specifically provide that the same analytical framework used to analyze the "seller-side" will be applied to the "buyer-side":

> Market power also encompasses the ability of a single buyer (a "monopsonist"), a coordinating group of buyers, or a single buyer, not a monopsonist, to depress the price paid for a product to a level that is below the competitive price and thereby depress output. The exercise of market power by buyers ("monopsony power") has adverse effects comparable to those associated with the exercise of market power by sellers. In order to assess potential monopsony concerns, the Agency will apply an analytical framework analogous to the framework of these Guidelines.

Merger Guidelines § 0.1. Thus, the Antitrust Division reviews mergers to determine not only whether they pose a competitive threat to persons buying goods or services from the merged entity, but also—as demonstrated by the Cargill/Continental case—whether they pose a competitive threat to persons selling goods or services to the merged entity.

While most of the mergers that the agencies review involve horizontal competitors, the agencies also have guidelines on non-horizontal mergers that address the circumstances in which a vertical merger—a transaction between companies at different levels in the production and marketing process—may be challenged.

B. Procedures for reviewing mergers

The Antitrust Division and the FTC use a clearance process to work out which agency will review a particular merger. The primary determinant is agency expertise about the product or service at issue, so that a merger will usually be reviewed by whichever of the two agencies is most knowledgeable about the relevant product or service.

We take concentration into account from the beginning of our review. In determining whether or not to conduct an investigation, we consider the pre-merger and post-merger concentration level in the affected markets. In those industries already characterized by high concentration levels, there is a substantially increased likelihood that a proposed merger will be subject to a formal—and often quite extensive—antitrust investigation.

The Antitrust Division and the FTC have an array of investigatory tools from which to choose in conducting such an investigation. Parties to most mergers meeting certain size thresholds must provide the agencies with advance notice and observe a waiting period before consummation, during which time the reviewing antitrust agency may obtain relevant information and conduct an investigation. In circumstances in which such notice is not required, the reviewing antitrust agency has other statutory powers for obtaining information.

If the reviewing antitrust agency concludes that the merger is not competitively problematic, the investigation will end and the parties then are generally free to proceed with the merger. However, if the reviewing antitrust agency does not fully resolve its competitive concerns, the agency will identify the nature of its competitive concerns and the parties will have an opportunity to address them. Unless the parties can convince the agency that suit is not warranted, the agency will prepare to file suit to challenge the transaction as originally proposed. Sometimes the parties make a proposal to address the competitive concerns that the reviewing antitrust agency has identified; for example, a merger between multi-product firms may raise competitive concerns with respect to only a subset of their products, in which case divestiture may solve the competitive problem, allowing the parties to proceed with the rest of the merger. There are times, however, when the merging parties'

proposed changes to the merger are not enough to solve the problem, in which case the reviewing antitrust agency will challenge the merger and likely seek a preliminary injunction to prevent consummation of the merger while it is being challenged.

C. Recent merger enforcement actions in agricultural industries

As a result of the clearance process with the FTC, the Antitrust Division has investigated the preponderance of mergers affecting agriculture, with a prominent exception being grocery store mergers, which are usually reviewed by the FTC. In the past two years, the Antitrust Division has objected to four significant proposed mergers in agriculture-related industries that we concluded would adversely affect farmers. Each of those transactions was important in its own right, and collectively they demonstrate the Antitrust Division's commitment to enforce the antitrust laws in this vital segment of our economy.

1. Two years ago, the Antitrust Division investigated Monsanto's proposed acquisition of DeKalb Genetics Corporation. Both companies were leaders in corn seed biotechnology and owned patents that gave them control over important technology. We expressed strong concerns about how the merger would affect competition for seed and biotechnology innovation. To satisfy our concerns, Monsanto spun off to an independent research facility its claims to agrobacterium-mediated transformation technology, a recently developed technology used to introduce new traits into corn seed such as insect resistance. Monsanto also entered into binding commitments to license its Holden's corn germplasm to over 150 seed companies that currently buy it from Monsanto, so that they can use it to create their own corn hybrids.

2. Last year, the Antitrust Division comprehensively reviewed the proposed purchase by Cargill of Continental's grain business, which resulted in a suit to challenge the merger as originally proposed. The merger affected a number of markets. The parties were buyers of grain and soybeans in various local and regional domestic markets and also sellers of grain and soybeans in the United States and abroad. We carefully looked at all of the potentially affected markets and ultimately concluded that the proposed merger could have depressed prices received by farmers for grain and soybeans in certain regions of the country; we were also concerned that the transaction could have had anticompetitive effects with respect to certain future markets.

To resolve our competitive concerns, Cargill and Continental agreed to divest a number of facilities throughout the Midwest and in the West, as well as in the Texas Gulf. The nature of the relief demonstrates the individualized attention that we paid to local and regional markets. We insisted on divestitures in three different geographic markets where both Cargill and Continental operated competing port elevators: (1) Seattle, where their elevators competed to purchase corn and soybeans from farmers in portions of Minnesota, North Dakota, and South Dakota; (2) Stockton, California, where the elevators competed to purchase wheat and corn from farmers in central California; and (3) Beaumont, Texas, where the elevators competed to purchase soybeans and wheat from farmers in east Texas and western Louisiana.

We also required divestitures of river elevators on the Mississippi River in East Dubuque, Illinois, and Caruthersville, Missouri, and along the Illinois River between Morris and Chicago, where the merger would have otherwise harmed competition for the purchase of grain and soybeans from farmers in those areas. The Illinois river divestitures (and an additional required divestiture of a port elevator in Chicago) also prevented the merger from anticompetitively concentrating ownership of delivery points that have been authorized by the Chicago Board of Trade for settlement of corn and soybean futures contracts.

In addition, we required divestiture of a rail terminal in Troy, Ohio, and we prohibited Cargill from acquiring the rail terminal facility in Salina, Kansas, that had formerly been operated by Continental, and from acquiring the river elevator in Birds Point, Missouri, in which Continental until recently had held a minority interest, in order to protect competition for the purchase of grain and soybeans in those areas.

This relief assures that farmers in the affected markets will continue to have alternative buyers to whom to sell their grain and soybeans. The case demonstrates that the Antitrust Division will challenge mergers that threaten competitive harm to sellers of goods and services.

3. Last November, the Antitrust Division filed a complaint challenging the proposed merger between New Holland and Case Corporation because of our concern that the transaction would lead to higher prices for certain types of machinery purchased by farmers. The parties manufactured and sold two- and four-wheel drive tractors that were used by farmers for a variety of applications, including pulling implements to till soil and cultivate crops. They also manufactured and sold a vari-

ety of hay and forage equipment, including square balers and self-propelled windrowers. The Antitrust Division concluded that the transaction would significantly lessen competition and lead to higher prices and lower-quality products.

The parties agreed to significant divestitures in order to address our concerns. Those divestitures included New Holland's large two-wheel-drive agricultural tractor business, New Holland's four-wheel-drive tractor business, and Case's interest in a joint venture that makes hay and forage equipment.

4. Most recently, Monsanto abandoned its proposed acquisition of Delta & Pine Land Co., after the Antitrust Division indicated that it was prepared to sue to prevent consummation of the transaction. The Antitrust Division concluded that the merger, which would have combined the two largest cotton seed companies, would have anticompetitively harmed farmers raising cotton.

Taken as a whole, these enforcement actions establish certain important propositions about our merger enforcement efforts in agriculture-related industries. The Antitrust Division carefully reviews agricultural mergers for their competitive implications. If a merger is likely to lead to anticompetitive prices for products purchased by farmers, the Antitrust Division will file suit (New Holland/Case). If a merger is likely to lead to anticompetitive prices for products sold by farmers, the Antitrust Division will file suit (Cargill/Continental). The Antitrust Division's concerns are not limited to traditional agricultural products, but extend also to biotechnology innovation (Monsanto/DeKalb and Monsanto/Delta & Pine Land). And, while the Antitrust Division will consider proposed divestitures and other forms of relief that permit a merger to proceed as restructured, the Antitrust Division will not shrink from challenging a merger outright if it concludes that lesser forms of relief are not likely to address fully the competitive problems raised by the merger (Monsanto/Delta & Pine Land).

II. CRIMINAL ENFORCEMENT OF THE ANTITRUST LAWS

In addition to our merger enforcement program, the Antitrust Division has moved aggressively to prosecute companies that engage in price fixing or allocation of customers. Such conduct willfully subverts the operation of free markets and can cause serious economic harm. It virtually always results in inflated prices to purchasers or depressed prices to suppliers; indeed, that is the very purpose of such conduct.

The key to such illegal conduct is an agreement among competitors. It is not enough for us to show that competitors charged the same or similar prices for a product or service. The Antitrust Division must prove that the competitors agreed upon prices or price levels, or upon the allocation of customers or markets, although we may be able to rely upon circumstantial evidence in order to do so. A company convicted of violating the antitrust laws is subject to substantial fines, and an individual convicted of violating the antitrust laws is subject to fine and imprisonment.

In the past few years, the Antitrust Division has prosecuted a number of cases and secured convictions and multi-hundred-million-dollar fines in various industries that have involved products purchased by farmers. Two prosecutions deserve particular mention.

1. Beginning in 1996, the Antitrust Division prosecuted Archer Daniels Midland and others for participating in an international cartel organized to suppress competition for lysine, an important livestock and poultry feed additive. The cartel had inflated the price of this important agricultural input by tens of millions of dollars during the course of the conspiracy. ADM pled guilty and was fined $100 million—at the time the largest criminal antitrust fine in history. Two Japanese and two Korean firms also were prosecuted for their participation in the worldwide lysine cartel and were assessed multi-million-dollar fines. In addition, three former ADM executives were convicted for their personal roles in the cartel; two of them have been sentenced to serve 36 and 33 months in prison, respectively, and fined $350,000 apiece for their involvement, and the other executive had 20 months added to a prison sentence he was already serving for another offense.

2. Last year, the Antitrust Division prosecuted the Swiss pharmaceutical giant, F. Hoffmann-La Roche Ltd., and a German firm, BASF Aktiengesellschaft, for their roles in a decade-long worldwide conspiracy to fix prices and allocate sales volumes for vitamins used as food and animal feed additives and nutritional supplements. The vitamin conspiracy affected billions of dollars of U.S. commerce. Hoffmann-La Roche and BASF pled guilty and were fined $500 million and $225 million, respectively. These are the largest and second-largest antitrust fines in history—in fact, the $500 million line is the largest criminal fine ever imposed in any Justice Department proceeding under any statute. Three former Hoffmann-La Roche executives from Switzerland and three former BASF executives from Germany agreed to submit to U.S. jurisdiction, to plead guilty, to serve time in a U.S. prison, and to pay

substantial fines for their role in the vitamin cartel. These prosecutions are part of an ongoing investigation of the worldwide vitamin industry, in which there have been 24 corporate and individual prosecutions to date, including convictions against Swiss, German, Canadian, Japanese, and U.S. firms, and convictions against 13 American and foreign executives who are now serving time in federal prison or awaiting potential jail sentences along with heavy fines.

The Antitrust Division will prosecute companies for price fixing whenever and however we learn of it. The lysine and vitamin cases get publicity because of the prominence of the companies involved and the amount of commerce at stake, but we also successfully prosecuted two cattle buyers in Nebraska a few years ago for bid-rigging in connection with procurement of cattle for a meat packer, after an investigation conducted with valuable assistance from the Department of Agriculture, which was investigating some of the same conduct under the Packers and Stockyards Act. In short, we have brought—and will continue to bring—charges against companies that engage in criminal behavior that adversely affects farmers.

III. OTHER POTENTIAL ANTICOMPETITIVE CONDUCT

The Antitrust Division also investigates other forms of business behavior that may have anticompetitive effects. Such conduct may constitute an illegal restraint of trade or unlawful monopolization or attempted monopolization. Conduct that may raise competitive issues of particular interest to farmers include strategic alliances between argribusiness companies, joint ventures among suppliers, and misuse of intellectual property rights.

The Antitrust Division is conducting a number of civil investigations in which we are considering whether conduct is having an anticompetitive impact upon farmers. It we determine that such is the case, we can and will seek appropriate relief under the antitrust laws. Just two weeks ago, for example, the Antitrust Division filed suit to challenge a non-compete agreement between developers of long-shelf-life-tomato seeds because we concluded that the agreement was interfering with the development of new seeds for use by American farmers.

IV. ADDITIONAL STEPS TO ENSURE APPROPRIATE ANTITRUST ENFORCEMENT

The Antitrust Division has taken additional steps to assure that it is receiving the information necessary to make the best-informed judgments with respect to agricultural antitrust issues.

Last year, the Antitrust Division (and the FTC) entered into a memorandum of understanding with the Department of Agriculture to assure that the agencies would continue to work together and exchange information relating to competitive developments in the agricultural marketplace. As part of this cooperation, the Department of Agriculture has provided significant assistance and expertise in the various agricultural industries that have been the focus of investigation. The Antitrust Division also works with other relevant federal agencies on specific matters of common interest. For example, the Antitrust Division worked closely with the Commodities Futures Trading Commission during the investigation of the Cargill/Continental merger.

Finally, earlier this year, Assistant Attorney General Joel Klein appointed Doug Ross as special counsel for agriculture. This is a newly created position that reports directly to the Assistant Attorney General. In this position, he is assigned to work exclusively on agricultural issues. He has over 25 years of law enforcement experience, both in and outside the Antitrust Division, and has met with and spoken to a number of farm groups both here in Washington and in farm states to explain to them how the antitrust laws work and to ask for their help in bringing relevant information to our attention. Among his particular qualifications for the position is his long-time association with the National Association of Attorneys General. The Antitrust Division has often worked with state attorneys general in trying to ascertain the potential impact of agricultural transactions on local farmers, and his assignment to agricultural matters on a full-time basis ensures that this process will be intensified.

V. CONCLUSION

Mr. Chairman and members of the Subcommittee, the Antitrust Division understands the concerns that have been expressed about competition in agricultural markets. We take seriously our responsibility to assure that the antitrust laws are enforced no less vigorously in agricultural markets than in other markets to which those same laws apply. We believe that our record of antitrust enforcement in this important sector of the economy demonstrates that commitment.

I would be happy to respond to whatever questions the Subcommittee may have.

Senator GRASSLEY. Mr. Chairman, are members going to be able to give opening statements?

Senator DEWINE. We will. I think what we are going to do, though, I know it will come as a disappointment for our audience not to hear these opening statements right now, but we are going to move, because the minority leader is here, we are going to move and let him testify, and then we will go to opening statements.

Senator Daschle, thank you very much for your patience, and thank you for joining us. You may proceed.

STATEMENT OF HON. TOM DASCHLE, A U.S. SENATOR FROM THE STATE OF SOUTH DAKOTA

Senator DASCHLE. Mr. Chairman, thank you very much for giving me the chance to share some thoughts with you and the members of the committee. I am grateful to you for your willingness to accommodate me. I know that other Senators wish to be heard on this issue. But this is really one of the more important questions we are facing in agriculture today, and I am so appreciative of the subcommittee's leadership as they look into ways with which to address the question of concentration.

In our lifetime, we have seen a degree of mechanization and growth in agriculture that nobody, frankly, could have forecast. The vast majority of those changes represent extraordinary progress in our ability to produce safe, and healthy and abundant food and fiber. But many of the changes have been positive for rural areas. Increasingly, Congress is recognizing that while that is true, some of these changes have created serious problems as well, such as reduced access to markets and barriers to fair competition for smaller independent producers.

We see a tendency towards concentration in just about every industry today, but that does not necessarily mean it is inevitable or, frankly, desirable. Competition among smaller businesses often provides the best example of free and vibrant market and low barriers to entry and relatively high levels of price transparency. So I take very seriously our responsibility to ensure that small businesses, and in this case farmers and ranchers, have access to markets, real opportunities to compete based on quality of their products.

In the livestock industry, many of the activities that we hear about sound wrong, yet they are not patently illegal. In many cases, I would argue that this occurs because we have not created the right legal tools to address such actions through sound public policy. And that is why I strongly believe that we need to enact legislation like S. 2411, the Farmers and Ranchers, Cattlemen, Fair Competition Act. Do we have the infrastructure in place to guarantee producers fair and competitive markets today? My view is that we do not. So, in essence, we try to do three things in the legislation that I know Senator Leahy has already addressed before this subcommittee this afternoon. And let me just, for emphasis, describe those three issues.

The first thing we try to do is to strengthen USDA's power to protect all producers from anticompetitive practice.

The second thing we try to do is require that the potential impact of proposed mergers on rural communities be considered dur-

ing the review process, that there be a time when we take a breath, and we look at and evaluate all of the consequences that might occur prior to the time that we just automatically acknowledge that maybe this merger is a good thing.

Third, we try to restore fairness to the agricultural markets by increasing the bargaining power itself of smaller independent producers. We do not attempt to tar and feather agribusiness, it does not single out firms simply on the basis of size, and it does not construct a protective wall around any segment of the industry. What we attempt to do is to address the potentially negative consequences of agribusiness concentration. These include such things as anticompetitive behavior by large producers, reduced market access for small producers, inadequate bargaining power and economic depression in rural communities. We are not trying to reshape the market. What we are trying to do is to give farmers and ranchers the tools to succeed in this rapidly changing marketplace.

The legislation does not reduce the power of either the Department of Agriculture or the Department of Justice. Both branches of Government, the legislative and the executive, need to be involved. And both of these agencies, which are charged with overseeing this trend in the industry, ought to be fully empowered. This bill addresses what I think is a very serious deficiency in the Department of Agriculture, a view that the findings of the GAO report on Packers and Stockyards just released last week reinforces.

You have already talked about the endorsement letter from the administration, and I am very pleased that they have taken a very active and supportive role in our efforts to move this legislation along. Senator Leahy, and I and the other co-sponsors of S. 2411 appreciate the interest and the support of the administration in this regard.

So, Mr. Chairman, in the interest of time, I do have a longer statement I would ask your consent to be submitted for the record.

Small and independent farmers and ranchers deserve a fair chance to compete. But in reality, this bill is for all of us. We all benefit from the innovation and productivity generated by truly competitive markets, and I am hopeful that we can pass legislation soon that will help restore fairness to the agricultural marketplace, and I certainly look forward to working with you and your colleagues on this subcommittee in an effort to do just that.

I thank you, again, for your willingness to allow me to be heard this afternoon.

[The prepared statement of Senator Daschle follows:]

PREPARED STATEMENT OF HON. TOM DASCHLE, A U.S. SENATOR FROM THE STATE OF SOUTH DAKOTA

Thank you for providing this opportunity to discuss the problem of increasing economic concentration and integration in the agriculture sector, and the extent to which the phenomenon may be impeding competition for smaller, independent operators. I appreciate the subcommittee's leadership on this issue, and look forward to working together to address it.

In our lifetime, we have seen a degree of mechanization and growth in agriculture that nobody could have forecast. The vast majority of those changes represent extraordinary progress in our ability to produce safe, healthy, and abundant food and fiber. Many of the changes have been positive for rural communities, as well. But increasingly, Congress is recognizing that some of these changes have created serious problems in rural areas, such as reduced access to markets and barriers to fair competition for smaller, independent producers.

We see a tendency toward concentration in just about every industry. But that doesn't necessarily mean it is inevitable, or desirable. Competition among smaller businesses often provides the best example of free and vibrant markets with low barriers to entry, and relatively high levels of price transparency. I take very seriously our responsibility to ensure that small businesses—and in this case farmers and ranchers—have access to markets, and real opportunities to compete based on the quality of their products.

In the livestock industry, many of the activities that we hear about sound wrong, yet they are not patently illegal. In many cases, I would argue that this occurs because we have not created the right legal tools to address such actions through sound public policy. That is why we need to enact legislation like S. 2411 (The Ranchers and Cattlemen's Fair Competition Act of 2000).

Do we have the infrastructure in place to guarantee producers fair and competitive markets today? My view is that we do not.

So, in essence, we try to do three things in the legislation:

First, S. 2411 would strengthen USDA's power to protect all producers from anti-competitive practices.

Second, it would require that the potential impact of proposed mergers on rural communities be considered during the review process.

Third, S. 2411 would restore fairness to agriculture markets by increasing the bargaining power of smaller, independent producers.

Our bill does not tar and feather agribusiness. It does not single out firms simply on the basis of size. And it does not construct a protective wall around any segment of the industry. What it does do is address the potentially negative consequences of agribusiness concentration.

These include such things as: (1) anti-competitive behavior by large procedures; (2) reduced market access for small producers; (3) inadequate bargaining power; and (4) economic depression in rural communities.

We are not trying to reshape the market. We are trying to give farmers and ranchers the tools to succeed in this rapidly changing marketplace.

The legislation does not reduce the power of either the Department of Agriculture or the Department of Justice. Both branches of government, the legislative and executive, need to be involved, *and* both of these agencies which are charged with overseeing this trend in the industry, ought to be fully empowered. This bill addresses what I think is a very serious deficiency in the Department of Agriculture, a view that the findings of the GAO Report on the Packers and Stockyards Administration, released just last week, reinforces.

The Administration has endorsed S. 2411—I have a letter from John Podesta that I would like to have inserted in the record. In the letter he states, "This legislation squarely confronts one of the most complex issues facing small farmers today: the impact of consolidation and concentration in the agriculture economy." As the Committee knows, Senator Grassley also has introduced legislation on this subject. He has indicated interest in working on a bipartisan basis to achieve a solution.

Senator Leahy and I, and the other cosponsors of S. 2411, appreciate his interest. We wholeheartedly support a constructive approach.

Mr. Chairman, small, independent farmers and ranchers deserve a fair change to compete. But in reality, this bill is for all of us. We all benefit from the innovation and productivity generated by truly competitive markets. I am hopeful that we can pass legislation soon that will help restore fairness to the agricultural marketplace. I look forward to working with my colleagues to achieve that goal. Thank you.

Senator DEWINE. Senator, thank you very much.

Senator Kohl, any questions?

Senator KOHL. No, thank you.

Senator DEWINE. Senator Grassley.

Senator GRASSLEY. No, I do not have questions. I thank the Senator for his testimony.

Senator DEWINE. We appreciate your testimony.

Senator DASCHLE. Thank you.

Senator DEWINE. Thank you very much.

We also have a statement that we will, without objection, submit for the record by Congressman Sherwood Boehlert

[The prepared statement and an attachment of Mr. Boehlert follow:]

PREPARED STATEMENT OF HON. SHERWOOD BOEHLERT, A U.S. REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEW YORK

Mr. Chairman and Members of the Committee: Thank you for the opportunity to testify before you today and for holding a hearing on this topic of great importance to the nation as a whole and to my Congressional District.

I represent the 23rd District of the State of New York, located in Central New York, where dairy farming has long been a mainstay of the local economy. But today, dairy farms are failing at an alarming rate.

Just thirty years ago, New York State was home to 28,000 dairy farms. Last year, the USDA reports, there were only 8,200 left.

Why are so many farms vanishing? One clear reason is that dairy farmers today are paid the lowest prices for milk in a quarter of a century. And this has happened while farmers' expenses, such as transportation and fuel costs, have skyrocketed.

The key question, then, is what's responsible for this sharp and sustained drop in the price farmers are paid for their milk? We suspect that one factor may be the increasing concentration of the milk processing industry. The statistics are cause for concern: the top 8 milk processors now control almost half—47 percent—of the national market. And in some areas, more than 70 percent of the milk supply is controlled by as few as one milk processor.

Has the reduced competition in the processing industry made it more difficult for farmers to receive a fair price for their milk, a price that would allow them at least to break even? At the very least, that's a question that merits further investigation.

Now people from urban areas may think, well, who cares about the farm price if a lower price for farmers means a better deal for consumers. But that's not the way things are working out. The same kind of industry concentration that appears to be harming farmers also appears to be harming consumers. This is a case of the middle of the dairy system playing against both ends.

While the farm price of milk has dropped, the price consumers are charged for milk in the grocery store has declined very little. In fact, in some areas of the country, the consumer price has actually gone up. Nowhere is this troubling trend illustrated more clearly than in the Chicago area, where, according to news reports, two of Chicago's major grocery store chains had been charging a dollar more for every gallon of milk than stores outside the area.

To be sure, those grocery stores have recently dropped their prices in the wake of unfavorable news coverage and the filing of a lawsuit by angry consumers. But the accumulation of market power that allowed them to raise their prices so high in the first place is growing worse. Today five national supermarket chains handle 40 percent of all milk sales in the U.S., a share controlled by 10 companies only five years ago.

Mr. Chairman, we may be hurtling toward a future that resembles the medieval past, where family farmers are reduced to mere subjects of powerful lords of the marketplace.

The bills before you today are on the right track. We need to enhance the government's ability to give much more careful scrutiny to ensure that our nation's family farmers do not become the innocent victims of anti-competitive business practices.

But there are steps the Administration could take right now. In the House, I have been circulating a bipartisan letter, along with my colleagues Gil Gutknecht from Minnesota, David Obey from Wisconsin, and Tim Holden from Pennsylvania, asking Attorney General Reno to open an investigation into possible market abuses by the milk processing and marketing industries. More than 20 Members have already agreed to sign the letter, which we plan to send next week.

The extent and apparent impact of the concentration in the dairy processing and retailing industries clearly merits anti-trust scrutiny.

In my district, and I'm sure in many of yours, we cannot afford to lose more of our dairy farms. We must stand up for our family farmers and make sure that the market is working fairly. I hope that this hearing will shed some light on this important issue and, again, I thank you for allowing me to testify before you today.

CONGRESS OF THE UNITED STATES,
Washington, DC, September , 2000.

Hon. JANET RENO,
U.S. Attorney General, Department of Justice, Washington, DC.

DEAR ATTORNEY GENERAL RENO: We are writing to urge you to begin an immediate investigation into possible market abuses by the dairy processing and retail marketing industries.

We believe the Justice Department should investigate why lower farm prices for milk have not been passed on to consumers. Since January 1999, the price dairy farmers earn for each gallon of beverage-quality milk has dropped about 44 cents,

or 26 percent, but the average price consumers across the nation pay for milk in the grocery store has slipped by a mere 18 cents a gallon, or 6 percent. In some parts of the Midwest, the consumer price for milk has increased. News reports indicate that in Chicago, for example, two of the major area grocery stores are charging over $1 a gallon more for milk than other stores.

The gap between payment to farmers and consumer prices has grown as the dairy processing and retailing industries have grown more concentrated. Today, five U.S. supermarket chains now handle 40 percent of milk sales—a share controlled by 10 companies only five years ago. Similarly, the top ten dairy processors now control 45 percent of that industry's market. An open market with true competition should produce lower prices for consumers, and perhaps higher payments to farmers as well. We would like to know if processing and retailing companies are engaging in collusion or otherwise abusing their market power.

Milk is the most important item on the grocery lists of many American families, and dairy farmers are a critical part of our nation's rural landscape. A competitive industry produces benefits for both farmers and consumers by allowing farmers to bargain for a fair price for their milk and consumers to take advantage of cost savings at the retail level. Instead, today's farmers earn less than 32 cents for every dollar consumers spend on dairy products, down from more than 50 cents twenty years ago.

We think there is more than enough evidence to begin an immediate investigation into the dairy processing and marketing industries. We appreciate your immediate attention to this important matter and look forward to the results of your investigation.

Sincerely,

Sherwood L. Boehlert; David R. Obey; Tim Holden; Gil Gutknecht; Tammy Baldwin; Sherrod Brown; Chaka Fattah; Sam Gejdenson; Wayne T. Gilchrest; Maurice D. Hinchey; Amo Houghton; Nancy L. Johnson; Paul E. Kanjorski; Ron Kind; Ron Klink; Dennis J. Kucinich; William O. Lipinsky; Frank Mascara; John M. McHugh; James L. Oberstar; David D. Phelps; Bernard Sanders; John E. Sweeney.

Senator DEWINE. We also note that Senator Paul Wellstone was here, could not stay because of a commitment that he has to a conference committee. We are going to make his statement a part of the record as well.

[The prepared statement and an attachment of Senator Wellstone follow:]

STATEMENT OF HON. PAUL D. WELLSTONE, A U.S. SENATOR FROM THE STATE OF MINNESOTA

Mr. CHAIRMAN. I would like to thank you for agreeing to hold this hearing on the impact of consolidation on America's family farmers. In my travels around Minnesota and around the country, I have found that family farmers rank the lack of a competitive market-place as the main cause of the crisis devastating rural America.

In March of this year, over four thousand people—most of them family farmers—from all over the country traveled to Washington, D.C. to participate in the "Rally for Rural America." The main reason why so many came to Washington, D.C. was to try to introduce some freedom into the free market system. Rally participants identified the raising level of market concentration, and the resulting lack of competition in the marketplace, as the key factor behind the low commodity prices family farmers are receiving.

Unfortunately, few realize the top four beef packers, flour millers, soybean crushers, and corn, chicken and sheep processors all control over 50 percent of their respective markets. By conventional measures, none of these markets is really competitive. In other words, there is a lack of effective competition in the processing markets for pork, beef, chicken, flour, soybean, and corn.

The effect of the recent trend towards concentration is that agribusiness conglomerates have increased their bargaining power over family farmers; they have muscled their way to America's dinner table. When farmers have fewer buyers to choose from, agribusinesses can more easily dictate conditions and prices that farmers have to meet. And fewer buyers means farmers often have to haul their production longer distances, driving up their transportation costs.

We are also seeing a dramatic increase in the vertical integration in the agricultural sector. Vertical integration occurs when one firm expands its control over the various stages of food productions, from developments of the animal or plant gene, to production of fertilizer and chemical inputs, to actual production, to processing, to marketing and distribution, to the supermarket shelf.

Vertical integration undermines the farmer's freedom in the marketplace. If a farmer has to buy her inputs from the same conglomerate to which she must sell her production, she loses many of her decision-making prerogatives. She loses much of her independence. With growing concentration and integration, the role of the farmer is being transformed from independent producer to skilled tradesman.

Finally, vertical integration destroys competitive markets. Potential competitors often never know the sale price for goods at any point in the process. That's because there never is a sale price until the consumer makes the final purchase, since nothing is being sold outside the integrated firm. It's hard to have effective competition if prices are not publicly available.

It all comes down to market power. Corporate agribusinesses are using their market power to lower prices, without passing those price savings on to consumers. The gap between what consumers pay for food and what farmers get paid is growing wider. According to USDA, from 1984 to 1998, prices paid to farmers fell 36 percent, while consumer food prices actually increased by 3 percent.

What we do know for sure is that thousands of farmers are being driven into bankruptcy, and that concentration is helping to depress prices and drive farmers off the land. That's reason enough for us to take immediate action to address the problem of concentration.

Unfortunately this Congress has failed to respond to the plight of our family farmers. Earlier this year I offered a modest amendment to help restore some competition to livestock markets by fully funding the Grain Inspection, Packers and Stockyards Administration's (GIPSA) initiatives to address market concentration. GIPSA has played a critical role in attempting to combat lack of competition, inadequate price information, anti-competitive practices, and abuse of market power in the livestock sector. My amendment was defeated by a three-vote margin, but I am hopeful that this essential funding can be restored in the final budget agreement.

Furthermore, I believe a comprehensive solution to restore competition to agricultural markets is needed. That is why I have joined Senator Daschle, Senator Leahy, and others in introducing the Farmers and Ranchers Fair Competition Act of 2000.

This legislation would (1) strengthen USDA's power to protect all farmers from anti-competitive practices; (2) require that the impact of proposed mergers on rural communities be considered during merger reviews; and (3) restore fairness and freedom to agriculture markets by increasing the bargaining power of smaller, independent family farmers.

Mr. Chairman, I am disappointed that the Senate has failed to pass comprehensive legislation to restore competition in agriculture, or even to address the matter, before the close of this Congress. I believe we must insist on a vigorous debate on concentration in the agricultural sector and immediate action early next year. If we want to sustain a vibrant rural economy and a thriving democracy, we need urgent action to restore competition to agriculture and urgent reform of our farm laws, Anything less will jeopardize the future of America's family farmers.

U.S. Senator For Minnesota

PAUL WELLSTONE

Washington, D.C. (202) 224-8440 • St. Paul, MN (651) 645-0323
http://wellstone.senate.gov/

FOR IMMEDIATE RELEASE
September 29, 2000

CONTACT: Jim Farrell or
Allison Dobson 202/224-8440

Wellstone Urges Congress to "Level the Playing Field" for Family Farmers

Testifies on the crisis in rural America, and expresses disappointment in Congress' inaction this year

(Washington D.C.) – Senator Paul Wellstone today testified on the impact of consolidation on America's family farmers before the Senate Judiciary Subcommittee on Anti-Trust, Business Rights and Competition. Wellstone pointed to the lack of a competitive marketplace as the central factor in the price crisis devastating rural America, and expressed his disappointment in Congress' failure to act on legislation to address the problem this year.

"**The effect of this surge in concentration is that agribusiness conglomerates have increased their bargaining power over family farmers, and they have muscled their way to America's dinner table,**" Wellstone said. "**When farmers have fewer buyers to choose from, agribusiness can more easily dictate conditions and prices that farmers must meet. Corporate agribusinesses are using their market power to lower commodity prices without passing those price savings on to consumers. Low farm prices are driving thousands of farmers into bankruptcy, and concentration is depressing prices.**"

The explosive growth in agribusiness has eliminated competition from agricultural markets almost completely. The top four processors of pork, beef, chicken, flour, soybeans and corn all control over 50 percent of their respective markets. This surge of agriculture conglomerates has meant trouble for family farmers in rural America. Farmers have fewer buyers to sell to, giving agribusiness the ability to control prices to their own advantage. The problem has been made worse by an increase in vertical integration, where one firm expands its control over the various stages of food production. Vertical concentration has destroyed competitive markets, and driven family farmers into bankruptcy. In light of this devastating situation, Wellstone expressed disappointment in Congress' inaction, and pressed for immediate action next year to end the price crisis in rural America.

"**During the Rally for Rural America over four thousand people-- most of them family farmers-- came to Washington to ask that Congress put the free market back into the free market system ,**" Wellstone said. "**I am disappointed that we have failed to pass comprehensive legislation to restore competition in agriculture before the close of this Congress. I believe that we must insist on a vigorous debate and immediate action early next year. If we want to sustain a vibrant rural economy and a thriving democracy, we need urgent reform of our farm laws, and anything less will jeopardize the future of America's family farmers.**"

###

OPENING STATEMENT OF HON. MIKE DeWINE, A U.S. SENATOR FROM THE STATE OF OHIO

Senator DEWINE. Let me move, at this point we will have opening statements and then we will go to our third panel.

Let me begin by saying that, like many of my colleagues, I am deeply committed to ensuring that our U.S. agriculture industry remains highly competitive. Vigorous competition is an essential element of the tremendous success that American agriculture has achieved. We must maintain that competition to ensure the future health of the farm sector. Competition helps ensure that farmers and producers receive fair prices for their products, that processors continue to innovate and increase efficiency and the consumers receive high-quality products at reasonable prices.

And let me just add that the issue of competition, the issue of consolidation of concentration is not something new. Going back to the early years, right before the turn of this century, this was a major issue. It has continued at different periods of time to be a major issue, and I think it is appropriate and correct that this committee is looking at this issue today.

Although American agriculture is the envy of the world, in recent years an increasing concentration in certain markets has raised important competition questions. For example, there has been increasing concentration at the processing level in both the grain and livestock segments of the industry, with national market shares of the four largest firms reaching as high as 80 percent for certain commodities. In certain regions, where all of the major processors have a significant market presence and numerous smaller buyers are active, this level of consolidation may not pose any concerns. However, the impact of this consolidation is felt very strongly by producers in regions where one or two processors have a particularly large market share, leaving farmers with a limited number of buyers for their products.

In addition, many agricultural sectors have seen an increase in the level of vertical integration as processors expand their reach throughout the chain of production by buying production and distribution facilities. This vertical integration has, in many instances, allowed processors to increase efficiency, cut price and compete successfully with international competitors. However, in certain instances, it has, in fact, limited the spot market for products and made it increasingly difficult for independent farmers to compete.

The mergers and consolidations that are driving these changes have, not surprisingly, sparked a great deal of controversy. The changes being felt throughout the many sectors of the farming community have led to a number of proposed legislative solutions, and we have heard about those today. Two which are of particular interest in today's hearing are S. 2411, the Farmers and Ranchers Fair Competition Act of 2000, introduced by Senator Daschle, and S. 2252, the Agriculture Competition Enhancement Act introduced by Senator Grassley. We are glad to have had the opportunity to have heard already from Senator Daschle and Senator Grassley, and they have described, in more detail than I will, what their bills do.

Of particular interest to this subcommittee is the fact that both bills foresee a greater role for the U.S. Department of Agriculture

in the analysis of mergers. Now, some people are concerned that changing the standard of merger analysis and including USDA in an official capacity, expanding their capacity, would create more problems than it would solve. We will explore that issue today, as well as others raised by these pieces of legislation.

In addition to our examination of domestic competition issues, we need to explore how to improve the access of American producers and processors to international markets. Our farmers are, hands down, the most efficient and cost-effective producers of high-quality agricultural products in the world. They are the best. Yet, time and time again, they find their products unfairly excluded from international markets. This is a significant problem for American farmers and is a major issue in this country today.

As the size and importance of international trade increases, fair access to these markets will be critical to the continued success of U.S. agriculture and U.S. farmers. Accordingly, I have sponsored two pieces of legislation aimed at addressing these concerns.

First, is the carousel retaliation legislation that I talked to Secretary Glickman about a few minutes ago. This law is designed to improve our ability to enforce the rights of the United States in instances where another World Trade Organization member fails to comply with the results of a dispute settlement proceeding. Specifically, the law requires the U.S. trade representative to make periodic revisions of trade retaliation lists in order to increase the likelihood of compliance.

However, as I pointed out to the Secretary today, though the carousel law was due to be implemented in June, the USTR has still not complied with it. This inaction is significant because we currently have an ongoing trade dispute with the European Union regarding beef and bananas. Both cases are important not just to specific producers and the distributors impacted by these cases, but to every American business seeking a fair shot at the European market.

Let us take a look at the beef dispute. The EU first imposed their ban on U.S. beef with growth hormones in 1985. When the United States sought rulings on this ban, either through the WTO or the General Agreement on Tariffs and Trade, GATT, through one or two of these processes, the result was the same. The EU's ban was found to be in violation of international trade rules. The rulings were upheld consistently. However, despite these repeated rulings—and I would say repeated—time after time after time, the EU still, to this day, refuses to comply.

The WTO determined that the EU beef ban was inflicting $116 million per year in economic damages to U.S. farmers. Many in our cattle industry believe the figure is much closer to a billion dollars a year. The ramifications of the USTR's inaction are significant. This inaction sends a message to the EU and to the world that the United States does not take these cases seriously. It sends a message to American farmers that the United States cares more for European interests than our own trade interests, and our own farmers, and our own people.

If we fail to secure EU compliance and open up important markets for our farmers and businesses, then we can expect them and others, like China, to continue their unfair tactics on other prod-

ucts and commodities. It sends the wrong signal to the world. This will ultimately render the entire WTO process and dispute settlement process meaningless.

Now, again, I stress the urgency of this matter, and again publicly call on the President to comply with the law that this Congress passed.

Separately, I have introduced S. 61, the Continued Dumping and Subsidy Offset Act, which now has the support of 19 co-sponsors in the Senate. This bill would address the problem of foreign producers selling their products in the United States at or below production costs in hopes of securing a greater share of the U.S. market or in hopes of eliminating U.S. competition altogether.

Now, despite the imposition of duty orders, the dumping continues. In certain cases, it has been ongoing, off and on, for over 25 years. It has become clear to me that foreign producers are not deterred by our trade laws. We desperately need better methods to deter and combat these unfair trading practices. This bill would provide some relief by transferring dumping and countervailing duties imposed on foreign dumpers to affected U.S. companies and farmers. Instead of the money going to the Treasury, it would go to the victims. The funds would be distributed to the affected petitioners for purposes such as plant modernization, worker training, retraining, health care and the purchase of safety and environmental equipment, just to name a few. The proposal is consistent and permitted under GATT and the WTO. I will continue pushing for Senate passage of this anti-dumping legislation.

Again, let me thank everyone for their patience, and I will turn to the ranking member of the subcommittee, Senator Kohl.

STATEMENT OF HON. HERBERT KOHL, A U.S. SENATOR FROM THE STATE OF WISCONSIN

Senator KOHL. I thank you, Mr. Chairman, for holding this hearing today. This is a particularly important time to examine competition in agriculture. Concentration and consolidation in the agricultural sector of our economy is a major concern today, especially for our very hardworking farmers and ranchers who continue to struggle with depressed farm prices.

In Wisconsin, milk prices are at their lowest level in over 20 years, which forced many dairy farmers out of business. Various legislative proposals have been introduced to attempt to ensure that strong competition is deserved in agriculture in the face of the continuing wave of consolidation, including the Farmers and Ranchers Fair Competition Act of 2000. This legislation, while perhaps not perfect in every respect, is, I believe, a good starting point.

Mr. Chairman, our Nation's farmers who comprise less than 2 percent of our country's population produce the most abundant, wholesome and by far the cheapest supply of food on the face of the globe. However, in the way in which that food is produced is rapidly changing, and this has created significant new challenges. The increasing number of mergers and industry, such as rail, grain, livestock and biotechnology have contributed to a massive reorganization of our food chain.

We have also witnessed increasing vertical integration in agriculture with, for example, the top four beef packers purchasing 80 percent of the Nation's cattle. And with the decreasing number of family farms, buyers and sellers of agricultural commodities are relying less on the traditional open spot markets and more on contractual and other alliances for selling products. Disparity in market power between family farmers and the large conglomerates all too often leaves the individual farmer with little choice regarding who will buy their products and under what terms.

In this time of enormous change and transformation in agriculture, we have to ask the important question of whether current antitrust laws are adequate for this sector of the economy. In my opinion, while we should not interfere with general market trends, at the same time we must not allow consolidation to stifle full and fair competition in agriculture. We must not allow abusive practices or disparities in bargaining power between farmers in agribusiness to disrupt equal access to the market or farmers' ability to receive fair prices for their products.

And while considering new legislation, we should not abandon our current antitrust legal doctrines. Instead, we should insist on vigorous enforcement of our antitrust laws whenever this enforcement is needed. For example, Senator Leahy and myself are today writing the Attorney General and the FTC to ask for an investigation of why the declining prices paid to farmers for milk in the upper Midwest, Vermont and elsewhere have not been passed on to consumers.

We want to thank our three terrific panels of distinguished witnesses testifying here today, including whether the Nation's leading antitrust authorities on this issue, Professor Carstensen. We have been particularly honored today to have the benefit of both the minority leader and Secretary Glickman's testimony. We all look forward to our witnesses' valuable insights on these very important issues.

Thank you, Mr. Chairman.

Senator DEWINE. Senator Kohl, thank you very much.

Senator Grassley.

STATEMENT OF HON. CHARLES E. GRASSLEY, A U.S. SENATOR FROM THE STATE OF IOWA

Senator GRASSLEY. I am going to put a very, very long statement in the record, and I want to still——

Senator DEWINE. Are you sure you do not want to give the very, very long statement?

Senator GRASSLEY. No, I want to give a shorter version of it.

First of all, I probably, even with 20-year low prices of dairy and 25-year low prices for grain, I probably hear more concern among the family farmers about this concentration issue and the lack of competition than I do about just low prices. I am not disputing anybody that might say otherwise, I am just telling you what I hear in my State. And so that is why I am very happy that Senator DeWine and Senator Kohl would respond to my request to hold today's hearing on concentration when I wrote them a letter several months ago, and thank them for doing that.

The U.S. Department of Agriculture has already very expansive authority to take action to prevent unfair and anticompetitive activity in the livestock market under the Packers and Stockyards Act. But the U.S. Department of Agriculture cannot do that job effectively until it addresses the key problems that its own inspector general found in 1997. And since we have discussed those problems to quite an extent, I am not going to go through those again because I questioned the Secretary about it, and previously under Secretary Dunn at a subcommittee hearing I held earlier this week. But I have introduced a bill, though, called the Packers and Stockyards Enforcement Improvement Act of 2000, which would require the U.S. Department of Agriculture to implement exactly what the General Accounting Office has recommended and to do it within 1 year. Because it is clear that the USDA has not responded as quickly as they should to the 1991 GAO report and their own 1997 inspector general report.

But this said, I still believe that the U.S. Department of Agriculture's authority could be enhanced to address competition in agriculture. That is why in February of this year I introduced S. 2252, which would formally involve the U.S. Department of Agriculture in the merger review process and expand its Packers and Stockyards Act competition authority from just livestock and poultry to all agricultural products. My bill would increase the Department of Justice and USDA attorneys and staff to implement their merger in anticompetitive practice responsibilities in regard to agriculture. In addition, this bill contains other provisions like extending protection to contract poultry growers and requiring agribusiness to report on their corporate structure and joint ventures. And a number of provisions of S. 2552 track suggestions provided to Congress in a ten-point program put out by several agricultural organizations.

I want to speak briefly about two primary provisions in the bill. S. 2552 strengthens USDA's position of authority when a large agribusiness merger or acquisition is being considered by the Department of Justice or the FTC under the Hart-Scott-Rodino Act. Right now, the Department of Justice and FTC look at large transactions. Their primary function in doing this is the impact on consumers. I believe that is a proper focus for antitrust review.

But I also believe that agriculture, being unique as it is, and family farming as an institution being unique as it is, deserve special consideration. There already is an exemption for agricultural cooperatives in the antitrust laws. However, some do not see this antitrust exemption as having adequately provided family farmers and the independent producers equal access to competitive markets. Others do not believe that the Department of Justice or the FTC have given enough attention to antitrust and competition issues in agriculture.

S. 2252 would address these concerns by requiring the U.S. Department of Agriculture to analyze the impact of large ag transactions, agribusiness transactions, on family farmers and independent producers. My bill would do this by having the U.S. Department of Agriculture formally involved—and I want to emphasize formally involved, not just through the Memorandum of Understanding that today exists—formally involved in the merger re-

view process and by requiring the U.S. Department of Agriculture to conduct a family farmer impact review. Currently, the Department of Justice and the FTC informally consult with the USDA when they look at ag transactions. However, this consultation is not mandatory. I believe that the USDA should be involved in the review process because the U.S. Department of Agriculture, of all departments of Government, and some would argue that maybe even the U.S. Department of Agriculture does not do this well enough, but they do have special technical and economic expertise in agricultural markets and farm policy. And that expertise ought to be involved in the process with the Department of Justice and the FTC.

So S. 2252 would formally inject USDA's expertise in the process by giving USDA a seat at the table when the Department of Justice and FTC review ag mergers and acquisitions. S. 2252 would require USDA to evaluate whether a proposed transaction would, according to the bill, "substantially harm the ability of independent producers and family farmers to compete in the marketplace."

This evaluation would have to be completed within the Hart-Scott-Rodino time frame, so nobody can complain that this is going to stretch out the process of a merger going through. I believe that the USDA's participation in the merger review process from the beginning makes sense because it gives the merging parties an opportunity to negotiate any necessary restrictions or conditions on the proposed transaction and so that the USDA's concerns can be addressed without disrupting or prolonging the Heart-Scott-Rodino process.

S. 2252 also provides that if the Department of Justice or the FTC decides not to challenge the merger, but the USDA still is not satisfied with the terms of the transaction because it believes that family farmers and independent producers will be harmed, then the U.S. Department of Agriculture may challenge the merger in Federal court within 30 days of the antitrust authority's decision not to oppose the transaction. That challenge would be based on the "substantial harm to independent producers' and family farmers' ability to compete in the market standard." I see this as nothing more than a shotgun behind the door.

I would like to clarify a few points about the merger provisions of S. 2252. My bill does not automatically stop a merger. USDA must prevail in Federal court with respect to the "substantial harm" standard in order to stop or impose conditions on an agribusiness merger. S. 2252 lists several factors that need to be considered by the USDA when conducting their analysis to determine that a proposed transaction violates that standard. USDA will only succeed in its challenge if a Federal court agrees that there has been a substantial violation of the standard.

Also, S. 2252 does not require the USDA to challenge a merger. In fact, it encourages the parties to negotiate any conditions, either during the Hart-Scott-Rodino process or within 30 days after the Department of Justice or the FTC decides not to oppose the merger. S. 2252 does not usurp DOJ's and FTC's current antitrust responsibility because the USDA can only challenge a transaction if the merger substantially harms farmers based upon the new family farmer producer standard. Consequently, DOJ and FTC are not pit-

ted against USDA. They have different statutory charges in terms of evaluating the proposed transaction.

Finally, my bill does not displace the DOJ–FTC antitrust review authority; rather, it strengthens the USDA's ability to make its concerns known and considered when a merger is reviewed, without disrupting the current anti-review process. S. 2252 also expands the USDA's ability to investigate and bring enforcement action against agribusinesses and producers who engage in anti-competitive, unfair and monopolistic practices. As I indicated before, USDA has significant investigative, enforcement and regulatory powers under the Packers and Stockyards Act to prevent unfair and anticompetitive practices in the cattle and hog industries. My bill expands this, as I have already stated.

Finally, S. 2252 would create a new position within USDA, the special counsel for competition matters, to make sure that appropriate attention is being paid to mergers and potential anticompetitive practices in agriculture. I think that S. 2252 is a good approach in terms of addressing the concentration and competition concerns expressed by independent producers and family farmers.

I have already relayed to others that I welcome comments on how to address concerns with my bill, so I look forward to working with the members of the committee and others to craft constructive legislation on this issue.

I want to end my remarks by saying that I believe that it would be a good idea to give the USDA more authority with respect to ag merger reviews. I also believe that it would be a good idea to expand USDA's existing authority to ensure competitive markets in livestock industry to all ag commodities. But it is important that the USDA also gets its own shop in order, and priorities as well, before we start giving it more responsibilities, especially when the USDA has just shown that it, according to the GAO report, has not done the job under existing powers—which, by the way, are listed by the General Accounting Office to be even more expansive than the Sherman Act. This is important for our family farmers and the entire ag community.

I thank you very much.

[The prepared statement of Senator Grassley follows:]

PREPARED STATEMENT OF SENATOR CHARLES E. GRASSLEY

Chairman DeWine and Senator Kohl, I'm pleased that you're holding this hearing today on concentration in agriculture. Concentration and anti-competitive activity in agriculture have been of significant concern for many farmers and producers in my state of Iowa and all across the country. That's why I requested that the Judiciary Committee look at whether antitrust issues exist in agriculture, and what Congress can do to address problems in this area.

Lately, farmers have been experiencing some extremely hard times. Farmers are receiving the lowest price in years for their commodities. On the other hand, agribusiness has become so concentrated that family farmers and independent producers are concerned that they can't get a fair price for their products. They're also concerned that the unchecked growth of agribusiness has made it easy for large companies to compete unfairly and to engage in predatory business practices.

The Justice Department and the Federal Trade Commission are responsible for protecting the marketplace from mergers, acquisitions and unfair practices that adversely affect competition. Specifically, DOJ and the FTC review large mergers, including agribusiness mergers, to determine that they are not anti-competitive. DOJ and the FTC also have the power to stop anti-competitive practices. I've pushed these agencies to make sure that agribusiness mergers don't harm family farmers.

I've pushed them also to make sure that they do everything in their power to investigate and pursue anti-competitive activity in agriculture.

In addition, USDA has significant power to take action against unfair and anti-competitive practices. The Grain Inspection, Packers and Stockyards Administration (GIPSA), has substantial, explicit authority under the Packers and Stockyards Act to halt anti-competitive activity in the livestock and poultry industries. GIPSA can take extensive investigative, enforcement and regulatory action to protect buyers and sellers in these industries. In fact, GIPSA's authority goes further than the Sherman Act in addressing anti-competitive activity.

So, USDA already has very broad powers to make sure that anti-competitive activity is not occurring in the livestock industry. But a GAO Report which I requested found that USDA hasn't been very successful in this responsibility at all. The GAO Report said that while USDA GIPSA has these broad investigative, enforcement and rule-making powers, it hasn't vigorously pursued any of these avenues to protect producers in the livestock industry. Basically, GIPSA has done very little to address competition-related concerns.

But what has disturbed me the most is the Report's findings that GIPSA has serious organizational, procedural and expertise problems which substantially impede GIPSA's ability to effectively perform its competition duties. I was shocked to learn that USDA knew it had problems when a GAO Report back in 1991 said that it needed to enhance its competition activities and implementing regulations to effectively address changes in the livestock market. I was even more shocked to learn that, in 1997, USDA's own Inspector General identified very specific organizational and expertise problems which had to be addressed so that GIPSA could do its job in protecting competition in the livestock market.

But the 2000 GAO Report says that USDA hasn't addressed the problems or implemented the recommendations contained in the 1997 USDA OIG Report. Let me demonstrate that with this chart, which was included in the GAO Report. The GAO chart says that there were six primary recommendations contained in the USDA OIG Report. But only one has been addressed. And the GAO testified just this past Monday in a hearing before my Judiciary Subcommittee, that these are "core" issues which must be addressed before USDA can effectively investigate and pursue competition-related cases.

These are fundamental problems within the USDA's GIPSA and Office of General Counsel. But why haven't they been addressed? Why isn't this a priority? I thought that this Administration was concerned about the plight of the family farmer and independent producer, but this GAO Report really sheds light on the inadequacies and lack of priorities of the USDA to protect competition.

The bottom line is this. USDA has to do everything under their current Packers and Stockyards Act authority to prevent unfair and anti-competitive practices in the cattle and hog industries. And to do that, USDA needs to get its act together to put in place the proper procedures, investigation and case methods, staff, and organization to pursue competition matters. As I said at my Subcommittee hearing, even if Congress were to enact further laws to give USDA more powers, USDA presently is in no state to accomplish anything to real benefit for farmers to protect competition. And the funding claims that USDA is making are just smoke and mirrors. Looking at the specific GIPSA and OGC appropriations requests, it is apparent that USDA has not focused on making competition-related matters a priority. In fact, USDA has never asked for antitrust lawyers for their Packers and Stockyards Act duties, not even in this last FY01 request.

USDA already has expansive authority to take action to prevent unfair and anti-competitive activity in the livestock market. But it can't do it effectively until it addresses the key problems that its own Inspector General found. USDA must implement the case methods and investigative processes specifically tailored for competition matters, and dedicate experienced antitrust lawyers to conduct these investigations and pursue them as legal cases which can be won in court. USDA also must review and update its implementing regulations with respect to competition matters. Until USDA does this—and the GAO provides them with the blueprint to do that—crafting more legislation and authority for USDA will probably do very little to help farmers and competition in agriculture. My bill, S. 3091, the "Packers and Stockyards Enforcement Improvement Act of 2000," will require USDA to implement these changes within a year, because it is clear that USDA will take its own sweet time in doing something about their shortcomings.

But this said, I still believe that USDA's authority could be enhanced to address competition in agriculture. In February, I introduced S. 2252, the "Agriculture Competition Enhancement Act", which would formally involve USDA in the merger review process and expand USDA's Packers and Stockyards Act competition authority from just livestock and poultry to all ag commodities. My bill would increase DOJ

and USDA attorneys and staff to implement their merger and anti-competitive practice responsibilities in regard to agriculture. In addition, my bill contains other provisions, like extending livestock protections to contract poultry growers and requiring agribusinesses to report on their corporate structure and joint ventures. A number of the provisions in S. 2552 track suggestions provided to Congress in a 10 point Farm Bureau action plan on agriculture concentration.

I'll speak briefly about the two primary provisions in my bill. S. 2252 strengthens USDA's position of authority when a large agribusiness merger or acquisition is being considered by the DOJ or FTC under the Hart-Scott-Rodino Act (HSR). Right now, when DOJ and FTC look at large transactions, their primary focus is the impact on consumers. I believe that this is the proper focus for an antitrust review. But, I also believe that agriculture is unique and deserves special considerations. There already is an exemption for agricultural cooperatives in the antitrust laws. However, some don't see this antitrust exemption as having adequately provided family farmers and independent producers equal access to competitive markets. Others don't believe that DOJ or FTC has given enough attention to antitrust and competition issues in the agriculture industry.

S. 2252 would address these concerns by requiring that the impact on family farmers and independent producers specifically be considered when mergers and acquisitions in the agriculture industry are analyzed by the federal antitrust authorities. My bill would do this by having USDA formally involved in the merger review process, and by requiring USDA to conduct a family farmer impact review. Currently, DOJ and the FTC informally consult with USDA when they look at ag transactions—there is a Memorandum of Understanding between the agencies on this subject. However, this consultation process is not mandatory. I believe that USDA should be involved in the review process because USDA has special technical and economic expertise in agricultural markets and farm policy.

So, S. 2252 would formally inject USDA's expertise in the review process by giving USDA a seat at the table when DOJ and FTC review ag mergers and acquisitions. S. 2252 would require USDA to evaluate whether a proposed transaction would "substantially harm the ability of independent producers and family farmers to compete in the marketplace." This evaluation would have to be completed within the HSR time-frame. I believe that USDA's participation in the merger review process from the beginning makes sense, because it gives the merging parties an opportunity to negotiate any necessary restrictions or conditions on a proposed transaction, and so USDA's concerns can be addressed without disrupting or prolonging the HSR process.

S. 2252 also provides that, if DOJ or the FTC decides not to challenge the merger, but USDA still isn't satisfied with the terms of the transaction because it believes that family farmers and independent producers will be harmed, USDA may challenge the merger in federal court within 30 days of the antitrust authorities' decision not to oppose the transaction. That challenge would be based on the "substantial harm to independent producers and family farmers' ability to compete in the market" standard.

Let me clarify a few points about the merger provisions in S. 2252. My bill doesn't automatically stop a merger—USDA must prevail in federal court with respect to the "substantial harm to family farmers and producers' ability to compete" standard in order to stop or impose conditions on an agribusiness merger. S. 2252 lists several factors that need to be considered by USDA when conducting their analysis to determine that a proposed transaction violates this standard. USDA will only succeed in its challenge if a federal court agrees that there has been a violation of this standard. Also, S. 2252 doesn't require USDA to challenge a merger—in fact, it encourages the parties to negotiate any conditions either during the HSR process or within 30 days after DOJ or FTC decides not to oppose the merger. S. 2252 doesn't usurp DOJ and FTC's current antitrust responsibility because USDA can only challenge a transaction if the merger substantially harms farmers based on the new "family farmer/producer" standard. Consequently, DOJ and the FTC are not pitted against USDA—they have different statutory charges in terms of evaluating a proposed transaction. Finally, my bill doesn't displace the DOJ/FTC antitrust review authority, rather it strengthens USDA's ability to make its concerns known and considered when a merger is reviewed, without disrupting the current antitrust review process.

In addition, S. 2252 expands USDA's ability to investigate and bring enforcement action against agribusinesses and producers who engage in anti-competitive, unfair or monopolistic practices. As I indicated before, USDA has significant investigative, enforcement and regulatory powers under the Packers and Stockyards Act to prevent unfair and anti-competitive practices in the cattle and hog industries. My bill would expand these powers so USDA could act in regard to all ag commodities.

Finally, S. 2252 would create a new position within USDA—a Special Counsel for Competition Matters—to make sure that appropriate attention is being paid to mergers and potential anti-competitive practices in agriculture.

I think that S. 2252 is a good approach in terms of addressing the concentration and competition concerns expressed by independent producers and family farmers. I've already indicated to others that I welcome comments on how to address concerns with my bill. So, I look forward to working with members of the Committee and others to craft constructive legislation on this issue.

I want to end my remarks by saying that I believe that it would be a good idea to give USDA more authority with respect to ag merger reviews. I also believe that it would be a good idea to expand USDA's existing authority to ensure competitive markets in the livestock industry to all ag commodities. But it's important that USDA get its shop and priorities in order before we start giving it more responsibilities, when USDA has just been shown to not be able to do its current job. This is important for our family farmers and for the entire ag community.

Senator DEWINE. Thank you. We will make, Senator, your formal statement a part of the record. We appreciate it very much.

Let me ask our witnesses to now come up. And as you come up, I will begin to introduce you.

Robert Gibbs serves as the 19th president of the Ohio Farm Bureau Federation, a 200,000-plus member organization founded in 1919. Mr. Gibbs has been a member of the Farm Bureau State Board of Trustees since 1985, representing members in Coshocton, Holmes, Knox and Licking Counties. He is a graduate of the Ohio State University, serves as supervisor of the Holmes County Soil and Water Conservation District and is a member of the Ohio Pork Producers Council.

J. Patrick Boyle joined the American Meat Institute, as president and chief executive officer, April 1, 1990. From 1986 to 1989, Mr. Boyle was administrator of the Agricultural Marketing Service at the U.S. Department of Agriculture, where he oversaw such programs as Federal meat grading and the National Beef and Pork Check-Off programs.

Leland Swenson was elected president of the National Farmers Union in 1988 and currently represents the 300,000 family farm members of the National Farmers Union. He also serves as chairman of the Development Cooperation Committee of the 50-nation International Federation of Agricultural Producers. Prior to being elected president, he served for 8 years as president of the South Dakota Farmers Union.

Luther Gilbert Tweeten is the economic consultant and professor emeritus of the Ohio State University Department of Agriculture, Environmental and Developmental Economics. He also serves as president of the American Agriculture Economics Association and vice president of the Federation of Scientific Agricultural Societies.

Peter Carstensen is the Young-Bascom professor of law and associate dean for Research and Faculty Development at the University of Wisconsin Law School. From 1968 to 1973, he was a trial attorney at the Antitrust Division of the U.S. Department of Justice.

We welcome all of you. We thank you for your patience, and we will start on my left and your right with Mr. Gibbs.

Mr. Gibbs, thank you. Good to see you.

STATEMENT OF ROBERT GIBBS, PRESIDENT, OHIO FARM BUREAU FEDERATION, COLUMBUS, OH

Mr. GIBBS. Good afternoon, Mr. Chairman, and members of the subcommittee.

My name is Bob Gibbs, and I am a full-time pork producer from Holmes County, OH. I am president of the Ohio Farm Bureau Federation, and I would like to thank you for the opportunity to comment on the continuing business concentration in the agricultural sector.

I recognize that the current trend in agribusiness concentration is blamed for many of the ails in our industry. Frankly, the trend is more a cost to examine the opportunities and national policy in a number of areas rather than call for increased regulation and further intrusion of the Government into the marketplace.

What we are experiencing is a result of consumers' increasing need for a convenience in the food products they enjoy, the success of those companies that supply these products and the narrow profit margins that currently plague our production and processing businesses.

To help farmers in rural America, I would suggest that we explore our priorities and policies in several key areas, including adequate enforcement of the current law, assessing the expertise at the Department of Agriculture, pursuing a national commodities contracting law and assistance for initiatives in rural America.

Monopoly power, whether it rises in industry, labor, finance or agriculture, can be a threat to our competitive enterprise system and the individuals freedoms of every American. For agriculture, the consolidations and subsequent concentration within our sector can have an adverse economic impact on U.S. family farms. To address this trend, we believe Congress should review existing statutes, develop legislation, if necessary, and strengthen the enforcement activities.

Reflecting on American Farm Bureau policy, the following key changes to antitrust statutes and regulations would help protect sellers of agricultural commodities from anticompetitive behavior:

Number one, the Department of Justice should ensure that proposed cooperative and/or vertical integration arrangements, if implemented, should continue to maintain independent producers' access to markets;

Number two, the USDA should be given authority to review and provide recommendations to the Department of Justice on agribusiness mergers and acquisitions.

Number three, a high-level position should be established within the Department of Justice to enforce antitrust laws in agriculture.

As a pork producer, I am very concerned about the rapid consolidation and processing in the rate of vertical integration. Over the last 2 years, I have witnessed unprecedented change and dealt with prices at or below Depression-era levels. I question whether our present laws are adequate to monitor and enforce the competitive implications of the structural changes occurring in the pork sector.

Increased staffing within the Transportation, Energy and Agriculture section of the Department of Justice would help to ensure that there is adequate attention being paid to agribusiness mergers and that consolidations are being aggressively reviewed for compliance with current statutes. The recent move to create a special counsel for agriculture at the Department of Justice is appreciated. However, we still request the establishment of a high-profile posi-

tion such as an assistant attorney general within the Department of Justice to lead this increased compliance effort. Such a development would send the message to producers and corporations that agribusiness mergers are taken seriously and will be handled accordingly.

The USDA could provide very important analysis to aid the Department of Justice in its work. While it is important to maintain the Department of Justice's ultimate review and enforcement authority, the USDA could assist with information about many of the unique aspects of agricultural markets. The USDA could be looked to for perspective on merger impact on prices, likelihood of predatory pricing and the effects on producers on a regional basis. This input should be a required part of the Department of Justice review of mergers that meet appropriate thresholds.

As consolidation continues, corporations seek to reduce risks by contracting with commodity input suppliers. For instance, hog slaughter concentration has increased dramatically with the percent of slaughter accounted for by just four firms increasing from 32 percent in 1985 to 54 percent in 1997. These firms are utilizing contracting to meet their supply and quality requirements. This is a growing phenomenon, and it needs careful review by Congress. Contracts may serve both parties well, but their impact is being felt on an industry that has long depended on traditional cash markets. This is a pretty important point. A lot of these contracts are based on the spot market, and we are concerned about that.

This has fueled greater concentration in hog production. In 1987, 37 percent of hogs were raised in operations of a thousand head or more. That share has rose to 71 percent in 1997. These trends have increased even more sharply in the last couple of years. As processors secure more and more product from selected producers, cash markets could evolve into little more than salvage markets for lower-quality products with depressed prices. Nonspot purchases in January 2000 accounted for 74 percent of the purchases by ten of the largest U.S. packers. This could have far-reaching impact, as many contracts are tied to the cash market prices.

My suggestion is for a national law or set of standards that set down the rules for agricultural contracting. Already many States are considering such legislation, and one or two of them have taken action. Before this continues, we need to address this issue in a consistent and reasoned fashion at the national level.

There is need for greater transparency with price information. Confidentiality clauses should be prohibited except to protect specific trade secrets. Such contract provisions prevent producers from discussing, comparing and contrasting differing types of contractual arrangements. Other provisions could provide both contract and independent producers with the information they need to succeed.

And beyond these considerations, I would encourage that we examine the impact of consolidation on rural America in two areas: regional economic impacts and barriers to innovation. From regional impact perspective, consolidation will further concentrate production of certain commodities into smaller and smaller regions as processors seek to minimize transportation and other costs. While understandable, other areas of the country without a market to supply will simply cease production. I would ask if that is what

we want from a strategic food supply basis and in consideration of the economic mix of local rural economies.

Innovation may also be stymied as large corporations with considerable market power engage in a variety of practices to ensure that start-up companies are slowed or stopped. Packing interests in hog production continues to rise with 24 percent of the total production owned by packers.

My suggestion for both of these issues is strong support for rural development programs that target smaller community and producer cooperative development. There is a great deal of research and planning currently underway by individuals and farm groups to bring producers together in unique collaborations and around value-added cooperatives, allowing them to compete in the marketplace.

In my own operation, we have organized to adapt new technologies and gain efficiencies to be competitive. We utilize them all by site strategy to achieve maximum performance and remain environmentally friendly. As a result, our operation is interconnected with several other family operations.

The Ohio Farm Bureau is aggressively seeking to establish new ventures, such as the Wheat Straw Board Manufacturing. I know there are many efforts in other States to organize producer alliances and other ventures in order to compete in our changing world. Probably the most exciting technology for igniting small business activity in our global world is the Internet. No doubt, this technology can connect buyers and sellers around the world, especially if shipping and transportation interests innovate to accommodate such entrepreneurial business. Trade barriers are further reduced and trade policy disputes can be quickly resolved. Incentives and programs to foster this type of economic activity would seem to have great value in keeping rural communities and economies strong.

Overall, I believe the consumer will continue to benefit from companies that have the research strength and capital to develop new products, but we must make sure that there are sufficient resources to ensure the concentrating market power remains in compliance with current law and regulation. We should include the expertise of the USDA in the analysis of mergers and acquisitions, given the unique nature of agricultural markets. As large companies move to control risk, a national agricultural contracting law could help all stakeholders.

And finally, as we look at the rural landscape, what can be done to encourage collaboration and cooperation among producers and processors?

Thank you for the opportunity, and I would appreciate any questions.

[The prepared statement of Mr. Gibbs follows:]

PREPARED STATEMENT OF ROBERT GIBBS

Good afternoon, Mr. Chairman, and members of the Subcommittee. My name is Robert Gibbs and I am a pork producer from Holmes County, Ohio. I am President of the Ohio Farm Bureau Federation. Thank you for this opportunity to comment on the continuing business concentration in the agricultural sector.

I recognize that the current trend in agribusiness concentration is blamed for many of the ills in our industry. Frankly, the trend is more a cause to examine op-

portunities and national policy in a number of areas, rather than a call for increased regulation and further intrusion of the government into the marketplace. What we are experiencing is the result of consumers' increasing need for convenience in the food products they enjoy, the success of those companies that supply these products, and the narrow profit margins that currently plague our production and processing businesses. To help farmers and rural America, I would suggest that we explore our priorities and policies in several key areas including adequate enforcement of current law, accessing the expertise at the Department of Agriculture, pursuing a national commodity contracting law, and assistance for initiatives in rural America.

Monopoly power—whether it arises in industry, labor, finance or agriculture—can be a threat to our competitive enterprise system and the individual freedoms of every American. For agriculture, the consolidations and subsequent concentration within our sector can have an adverse economic impact on U.S. family farms. To address this trend, we believe Congress should review existing statutes, develop legislation if necessary, and strengthen enforcement activities.

Reflecting on American Farm Bureau policy, the following key changes to antitrust statutes and regulations would help protect sellers of agricultural commodities from anticompetitive behavior:

(1) The Department of Justice should ensure that proposed cooperative and/or vertical integration arrangements, if implemented, should continue to maintain independent producers' access to markets;

(2) The USDA should be given authority to review and provide recommendations to the Department of Justice on agribusiness mergers and acquisitions; and

(3) A high level position should be established within the Department of Justice to enforce antitrust laws in agriculture.

As a pork producer, I am very concerned about the rapid consolidation in processing and the rate of vertical integration. Over the last two years, we have witnessed unprecedented change and dealt with prices at or below Depression era levels. I question whether our present laws are adequate to monitor and enforce the competitive implications of the structural changes occurring in the pork sector.

Increased staffing within the Transportation, Energy, and Agriculture section of the Department of Justice would help to ensure that there is adequate attention being paid to aribusiness mergers and that consolidations are being aggressively reviewed for compliance with current statutes. The recent move to create a Special Counsel for Agriculture at the Department of Justice is appreciated. However, we would still request the establishment of a high profile position, such as Assistant Attorney General, within the Department of Justice to lease this increased compliance effort. Such a development would send the message to producers and corporations that agribusiness mergers are taken seriously and will be handled accordingly.

The USDA could provide very important analysis to aid the Department of Justice in its work. While it is important to maintain the Department of Justice's ultimate review and enforcement authority, the USDA could assist with information about many of the unique aspects of agricultural markets. USDA could be looked to for perspective on merger impact on prices, likelihood of predatory pricing, and the effects on producers on a regional basis. This input should be a required part of the Department of Justice's review of mergers that meet appropriate thresholds.

As consolidation continues, corporations seek to reduce risk by contracting with commodity input suppliers. For instance, hog slaughter concentration has increased dramatically with the percent of slaughter accounted for by just four firms increasing from 32.2 percent in 1985 to 54 percent in 1997. These firms are utilizing contracting to meet their supply and quality requirements. This is a growing phenomenon and it needs careful review by Congress. Contracts may serve both parties well, but their impact is being felt on an industry that has long depended on traditional cash markets. This has fueled greater concentration in hog production. In 1987, 37 percent of hogs were raised on operations with 1,000 head or more—that share rose to 71 percent by 1997. These trends have increased even more sharply in the last couple of years.

As processors secure more and more product from selected producers, cash markets could evolve into little more than salvage markets for lower quality products with depressed prices. Non-spot purchases in January 2000 accounted for 74.3 percent of purchase by 10 of the largest U.S. packers. This could have far reaching impact as many contracts are tied to cash market prices.

My suggestion is for a national law or set of standards that set down the rules for agricultural contracting. Already many states are considering such legislation; one or two have taken action. Before this continues, we need to address this issue in a consistent and reasoned fashion at the national level. There is a need for greater transparency with price information. Confidentiality clauses should be prohibited, except to protect a specific trade secret. Such contract provisions prevent producers

from discussing, comparing and contrasting differing types of contractual arrangements. Other provisions could provide both contract and independent producers with the information they need to succeed.

And beyond these considerations, I would encourage that we examine the impact of consolidation on rural America in two areas: regional economic impacts and barriers to innovation. From a regional impact perspective, consolidation will further concentrate production of certain commodities into smaller and smaller regions as processors seek to minimize transportation and other costs. While understandable, other areas of the country without a market to supply will simply cease production. I would ask if that is what we want from a strategic food supply basis and in consideration of the economic mix of local rural economies. Innovation may also be stymied as large corporations with considerable market power engage in a variety of practices to ensure that start-up companies are slowed or stopped. Packing interest in hog production continues to rise with 24 percent of total production owned by packers.

My suggestion for both of these issues is strong support for rural development programs that target smaller community and producer cooperative development. There is a great deal of research and planning currently underway by individuals and farm groups to bring producers together in unique collaborations and around value added cooperatives, allowing them to compete in the marketplace. In my own operation, we have organized to adopt new technologies and gain efficiencies to be competitive. We utilize a multi-site strategy to achieve maximum animal performance and remain environmentally friendly. As a result, our operation is interconnected with several other family operations.

The Ohio Farm Bureau is aggressively seeking to establish new ventures such as wheat strawboard manufacturing. I know there are many efforts in other states to organize producer alliances and other ventures in order to compete in our changing world. Probably the most exciting technology for igniting small business activity in our global world is the Internet. No doubt this technology can connect buyers and sellers around the world especially if shipping and transportation interests innovate to accommodate such entrepreneurial business, trade barriers are further reduced, and trade policy disputes can be quickly resolved. Incentives and programs to foster this type of economic activity would seem to have great value in keeping rural communities and economies strong.

Overall, I believe the consumer will continue to benefit from companies that have the research strength and capital to develop new products. But we must make sure that there are sufficient resources to ensure that concentrating market power remains in compliance with current law and regulation. We should include the expertise of the USDA in the analysis of mergers and acquisitions given the unique nature of agricultural markets. As large companies move to control risk, a national agricultural contracting law could help all stakeholders. And finally as we look at the rural landscape, what can be done to encourage collaboration and cooperation among producers?

Thank you for the opportunity to comment and I would be happy to answer any questions.

Senator DEWINE. Mr. Gibbs, thank you very much.

Mr. Boyle.

STATEMENT OF J. PATRICK BOYLE, PRESIDENT AND CHIEF EXECUTIVE OFFICER, AMERICAN MEAT INSTITUTE, ARLINGTON, VA

Mr. BOYLE. Good afternoon, Mr. Chairman. Thank you for allowing me to appear before the subcommittee. And at the outset, let me thank you for your continued support for carousel retaliation, a very potentially effective tool to ensure fair trade with the European Union once the administration implements it.

Senator DEWINE. We just need them to start using it, Mr. Boyle.

Mr. BOYLE. We agree with that, and we are appreciative of your continued support.

Senator DEWINE. Thank you very much.

Mr. BOYLE. The American Meat Institute represents the Nation's meat and poultry industry, an industry that employs nearly 500,000 individuals and contributes about $90 billion in sales to

the Nation's economy. Among AMI's 300 meat packing and processing companies, 60 percent are small family-owned businesses employing fewer than 100 individuals. These companies operate, compete, sometimes struggle, but yet mostly thrive on what has become one of the toughest, most competitive and certainly the most scrutinized sectors of our economy.

In fact, at a Senate hearing earlier this week, USDA's general counsel remarked that the meat packing industry is probably the most studied industry in the U.S. economy. And to provide some support for the general counsel's observation, I would like to provide for the record, Mr. Chairman, a partial, yet representative, bibliography of studies that have been conducted on the meat packing industry. Since 1960, more than 100 in 4 decades, 56 in the last 10 years alone.

Senator DEWINE. These are studies?

Mr. BOYLE. These are studies, Mr. Chairman—studies conducted by USDA, by GAO, by academic institutions, by private organizations.

Senator DEWINE. You are going to summarize those for us, Mr. Boyle, are you?

Mr. BOYLE. I am actually going to submit them for the record, with your permission, Mr. Chairman.

Senator DEWINE. They will be made a part of the record.

I thought it would be helpful if you might summarize what they tell us, though. You can do that sometime.

Mr. BOYLE. I would be happy to.

Senator DEWINE. Go right ahead.

Mr. BOYLE. In general, I will conclude, however, that those studies have not indicated any anticompetitive or antitrust behavior that runs afoul of the Federal statutes or the regulations that apply to competition in the meat sector industry.

The entire food production, distribution and marketing sector has undergone structural changes in the past decade. Consumers have increased their demands for consistent low-priced products. This has driven consolidation in the retail and food service sectors and, in turn, food distributors and manufacturers have consolidated in an effort to keep pace with the retail and food service customers.

Intense competition in the meat industry is driving businesses to operate more efficiently. Sometimes that has meant the businesses choose to merge or to acquire or be acquired in order to stay in business. Surviving is especially important in smaller rural communities, where a meat packing company may be one of that community's larger employers.

Throughout these structural changes, AMI has long supported and continues to support strong effective antitrust oversight from the Department of Justice, from the FTC and the added regulatory oversight unique to the livestock and meat sector provided by GIPSA at the Department of Agriculture. Indeed, to increase market transparency even further for livestock producers, USDA is about to implement a mandatory price-reporting law that will require the packers that we represent to report prices for hogs, and cattle and boxed beef on a daily basis, as well as to provide to the Department of Agriculture copies of livestock procurement contracts.

However, with respect to the two bills being discussed today, AMI opposes them because we believe they would dilute the focus and effectiveness of current Federal antitrust enforcement, unfairly single out the agribusiness community for different antitrust enforcement from the rest of the economy's business community and prolong and bring uncertainty to antitrust policy enforcement by inserting the U.S. Department of Agriculture into the pre-merger review process. A discussion of our specific concerns regarding particular provisions of the bills is contained in my written statement.

In addition to AMI, these bills are opposed by numerous organizations as diverse as the Antitrust Section of the American Bar Association, the National Associations of Manufacturers, the U.S. Chamber of Commerce, the Grocery Manufacturers of America, the Food Marketing Institute and virtually all food and commodity processing organizations. Again, with your permission, Mr. Chairman, I would like to submit for the record a letter from NAM, as well as a letter signed by nearly two dozen food processing organizations.

Senator DEWINE. We will make those part of the record.

Mr. BOYLE. In conclusion, I respectfully urge the subcommittee not to pass legislation that would single out the agribusiness community for a different approach to pre-merger reviews and antitrust enforcement. And I thank you for the opportunity to appear before this subcommittee today.

[The information, NAM letter, and prepared statement of Mr. Boyle follow:]

LISTING OF STUDIES
Page 1

Title	Author(s)	Date
Meat Packer Vertical Integration and Contract Linkages in the Beef and Pork Industries: An Economic Perspective	Marvin Hayenga, Ted Schroeder, John Lawrence, Dermot Hayes, Tomislav Vukina, Clement Ward and Wayne Purcell	May 22, 2000
Consolidation in U.S. Meatpacking (USDA/Economic Research Service Agricultural Economic)	James MacDonald, Michael Ollinger, Kenneth Nelson and Charles Handy	Feb-00
Price Discovery & Risk Management in an Industrialized Pork Sector	David Kenyon and Wayne Purcell (Virginia Tech)	January-00
Impact of Increasing Production or Marketing Contract Volume on Access to Competitive Markets	Marvin L. Hayenga, Neil E. Hard, John D. Lawrence (Iowa State University)	January 21, 2000
Pork Industry: USDA's Reported Prices Have Not Reflected Actual Sales (General Accounting Office Letter Report)	General Accounting Office	December 14, 1999
Econometric Analysis of Fed Cattle Procurement in the Texas Panhandle (USDA/GIPSA)	J.R. Schroeter and A. Azzam	November-99
Review of Fed Cattle Investigation in the Texas Panhandle	R.J. Sexton	March 26, 1999
Estimated Value of Non-Price Vertical Coordination in the Fed Cattle Market (Research Bulletin 2-99)	J.D. Anderson and J.N. Trapp (Virginia Tech)	February-99
Contracting: More Farmers Managing to Cut Risk	USDA/Economic Research Service	February-99
Structural Change and Market Performance in Agriculture: Critical Issues and Concerns About Concentration in the Pork Industry (Staff Paper)	Philip Paarlberg, Michael Boehlje, Kenneth Foster, Otto Doering, and Wallace Tyner (Purdue University)	1999
Impacts from Captive Supplies on Fed Cattle Transaction Prices (Journal of Agricultural and Resource Economics)	C.E. Ward and S.R. Koontz and T.C. Schroeder	December 23, 1998
Western Cornbelt Hog Procurement Investigation (GIPSA Backgrounder)	USDA/GIPSA	October 9, 1998
Contract Production in U.S. Agriculture: A Characterization of Current Empirical Research	Charles Knoeber	Feb-98
From the Plains to the Plate: Can the Beef Industry Regain Market Share? (in Federal Reserve Bank of Kansas City, Econ. Rev.)	R.L. Lamb and M. Beshear	1998

LISTING OF STUDIES
Page 2

Managing Risk in Farming: Concepts, Research, and Analysis	USDA/Economic Research Service	1998
Cost Structures of Pork Slaughter and Processing Firms: Behavioral and Performance Implications (Review of Agricultural Economics)	Marvin Hayenga	1998
Vertical Coordination in the U.S. Pork Industry: Status, Motivations and Expectations (Agribusiness: An International Journal)	John D. Lawrence, V.J. Rhodes, G.A. Graimes and Marvin L. Hayenga	January-February 1997
Price Discovery and the Future of the Livestock Sector (In Price Discovery in Concentrated Livestock Markets: Issues, Answers, Futures Direction)	D.R. Koontz and W.D. Purcell (Virginia Tech)	1997
Information Asymmetry as a Reason for Food Industry Vertical Integration (American Journal of Agricultural Economics)	D.A. Hennessy	Nov-96
Vertical Coordination in Hog Production (GIPSA-RR 96-5)	Marvin Hayenga, V. James Rhodes, Glenn Grimes and John Lawrence	May-96
Assessing Competition in Meatpacking: Economic History, Theory, and Evidence	Azzeddine M. Azzam, Dale G. Anderson (USDA/PSP/GIPSA)	May-96
Grower's Use of Marketing and Production Contracts, AER-747	USDA/Economic Research Service	1996
Production Uncertainty and Factor Price Disparity in the Slaughter Cattle Market: Theory and Evidence	S.W. Fausti and D.M. Feuz	Aug-95
The Industrialization of Hog Production (Review of Agricultural Economics)	V.J. Rhodes	May-95
The Industrialization of Hog Production (Review of Agricultural Economics)	V.J. Rhodes	1995
Long-Run Impacts of Captive Supplies (In Role of Captive Supplies in Beef Packing)	A.P. Barkley and T.C. Schroeder	

Concentration-Price Relations in Regional Fed Cattle Markets (Food Marketing Policy Center Research Report No. 25)	Bruce W. Marion and Frederick E. Geithman	1994
The Impact of Forward Contracting on Fed Cattle Transaction Prices (Review of Agricultural Economics)	Ted C. Schroeder, Rodney Jones James Mintert and Andrew P. Barkley	1993
Meatpacker Conduct in Fed Cattle Pricing : An Investigation of Oligopsony Power (American Journal of Agricultural Economics)	Stephen R. Zcontz, Philip Garcia and Michael A. Hudson	1993
The Tradeoff Between Oligopsony Power and Cost Efficiency in Horizontal Consolidation: An Example from Meat Packing (American Journal of Agricultural Economics)	Azzeddine M. Azzam and John R. Schroeter	
Markdown Pricing and Cattle Supply in the Beef Packing Industry (American Journal of Agricultural Economics)	Kyle W. Stiegert, Azzeddine Azzam and B. Wade Brorsen	1993
Evolution of Producer-Packer Relationships (Proceedings of the Minnesota Swine Conference for Veterinarians)	Marvin Hayenga and Kevin Kimle (University of Minnesota)	1992
The Changing Structure of the Beef and Pork Slaughter Industries Agricultural Input and Processing Industries (Agriculture and Home Economics Experiment Station Bulletin RD-04)	Marvin Hayenga and Kevin Kimle (University of Minnesota)	1992
Packer Competition, Forward Contracting Price Impacts, and the Relevant Market for Fed Cattle In Wayne Purcell, ed., Pricing and Coordination in the Consolidated Livestock Markets, Captive Supplies, Market Power, IRS Hedging Policy	Marvin L. Hayenga and Dan O'Brien (Research Institute on Livestock Pricing)	Apr-92
Chapter 6: Annotated Bibliography In Wayne Purcell, ed., Pricing and Coordination in Consolidated Livestock Markets, Captive Supplies, Market Power, IRS Hedging Policy	John B. Roswell	April-92
Implications of Captive Supplies in the Fed Cattle Industry, In Wayne	Ted C. Schroeder, James Mintert, Andrew Barkley and	Apr-92

D. Purcell, ed. Pricing and Coordination in Consolidated Livestock Markets, Captive Supplies, Market Power, IRS Hedging Policy	Rodney Jones	
Inter-Firm Differences in Fed Cattle Prices in the Southern Plains (American Journal Economics)	Clement E. Ward	1992
Packer Integration into Hog Production: Current Status and Likely Impacts of Increased Vertical Control on Hog Prices and Quantities	A.M. Azzam and A.C. Wellman (University of Nebraska)	1992
Evolution of Producer-Packer Relationships (Proceedings of the Minnesota Swine Conference for Veterinarians)	Marvin Hayenga and Kevin Kimle (University of Minnesota)	1992
The Impact of Captive Supplies on the Fed Cattle Industry	Ted Schroeder, Rodney Jones, James Mintert, and (Kansas State University)	October-91
Packer Competition, Forward Contracting Price Impacts, and the Relevant Market for Fed Cattle	Marvin Hayenga, Dan O'Brien (Iowa State University)	September-91
Cointegration Tests and Spatial Price Linkages in Regional Cattle Markets (American Journal of Agricultural Economics)	Barry K. Goodwin and Ted C. Schroeder	1991
Global Strategies and Local Linkages: The Case of the U.S. Meatpacking Industry	Lourdes Gouveia (University of Nebraska-Omaha)	1991
Implications of Increased Regional Concentration and Oligopsonistic Coordination in the Beef Packing Industry (Western Journal of Agricultural Economics)	Azzeddine M. Azzam and John R. Schroeter	1991
The Farm-Retail Price Spread in an Imperfectly Competitive Food Industry (American Journal of Agricultural Economics)	Garth J. Holloway	1991
Marketing, Margins, Market Power and Price Uncertainty (American Journal of Agricultural Economics	John R. Schroeter and Azzeddine Azzam	1991
U.S. General Accounting Office Report to Congressional Requesters Beef Industry Packer Market Concentration and Cattle Prices	U.S. General Accounting Office	December-90
Relationship Between Structure and Performance in the Steer and Heifer Slaughtering Industry	John W. Helmuth and John R. Muitop (Congress ofs the United States, House of Representatives,	September 19, 1990

Impact of Beef Packer Consolidation on Live Cattle Prices and Retail Beef Prices	Committee on Small Business) John Nalivka, Bill Helming, Ron Drain and W.T. Berry (The Helming Group)	March 7, 1990
Structural Changes in the Livestock Sector: Causes Implications, Continuing Issues	Wayne D. Purcell (Research Institute on Livestock Pricing)	February-90
Measuring Market Power in Multi-Product Oligopolies: The U.S. Meat Industry (Applied Economics)	John R. Schroeter and Azzeddine Azzam	1990
Meatpacking Plant Capacity and Utilization: Implications for Competition and Pricing (Agribusiness, An International Journal)	Clement E. Ward	1990
Monopsony Power in Industry in Disequilibrium: Beef Packing, 1971-1986 (Working Paper No. 96)	Bruce W. Marion, Frederick E. Geithman and Gwen Quail (University of Wisconsin-Madison)	1990
Meatpacking Plant Capacity and Utilization: Implications for Competition and Pricing (Agribusiness)	C.E. Ward	1990
Testing Oligopolistic and Oligopsonistic Behavior: An Application to the U.S. Meat-Packing Industry (Journal of Agricultural Economics)	Azzeddine M. Azzam and Emilio Pagoulatos	1990
Integration of the Meatpacking Industry: Its Effects on the Farmer and the Consumer	U.S. Congress, House of Representatives, Subcommittee of Government Information, Justice, and Agriculture of the Committee on Government Operations, 101st Congress, Second Session	1990
Concentration in Lamb Slaughtering Industry: Impact on Lamb Prices	Dale J. Menkhaus, Glen D. Whipple and Clement E. Ward	1990
Economic Concentration in the Meatpacking Industry	U.S. Congress, House of Representatives, Subcommittee on Nutrition and Investigations of the Committee on Agriculture, Nutrition and Forestry, 101st Congress	1990
Forward Contracting of Fed Cattle: Extent, Benefits, Impacts,	C.E. Ward and T.J. Bliss (Research Institute on Livestock Pricing, Oklahoma State University)	November-89
Symposium Proceedings **Structural Change in Meat Packing: Causes and Implications**	Wayne Purcell and John B. Rowsell, Eds.	Oct-89

Meat Packer Slaughter Concentration and Vertical Integration Meeting (Focus Papers)	Dr. Ed Uvacek (Western Research Institute, College Station, Texas)	March 22, 1989
Price Spreads and Market Power in Food Processing Industries	Azzeddine M. Azzam and Emilio Pagoulatos	1989
Competitive Issues in the Beef Sector: Can Beef Compete in the 1990s (Hubert H. Humphrey Institute of Public Affairs Report No. 1)	D. Gale Johnson, John M. Connor, Timothy Josling Andrew Schmitz and G. Edward Schuh (University of Minnesota)	1989
Packer Consolidation in the Sheep Industry	Clement E. Ward (Oklahoma State University)	1989
Technical Assistance Report: Market Access in an Era of Structural Change	Julie A. Hogeland	September 26, 1988
in the Livestock Industry	(USDA, Agricultural Cooperative Service)	
Packer Concentration and Vertical Integration	National Cattlemen's Association Industry Structure Subcommittee	February 15, 1988
Assessing Structural Changes in the U. S. Meatpacking Industry	Clement E. Ward (Oklahoma State University)	January-88
Price Assemmetry in the U.S, Pork Marketing Channel (North Central Journal of Agricultural Economics)	Milton S. Boyd and B.W. Borsen	1988
Meatpacking Competition and Pricing (Research Institute on Livestock Pricing)	Clement E. Ward	1988
Estimating the Degree of Market Power in the Beef Packing Industry (Review of Economics and Statistics)	John R. Shroeter	1988
Market Access in an Era of Structural Change in the Livestock Industry	Julie A. Hogeland (USDA, Agricultural Cooperative Service)	1988

Productivity - Concentration Relationship in the U.S. Meatpacking Industry (Southern Journal of Agricultural Economics)	Clement E. Ward	1987
Red Meat and Poultry: Industries in Transition 1970-1985	Abel, Daft and Earley (The Food Institute)	June-86
The Impact of Packer Buyer Concentration on Live Cattle Prices (Working Paper No. 89)	Gwen Quail, Bruce Marion, Frederick Geithman and Jeffrey Marquardt (University of Wisconsin-Madison)	May-86
Price Impacts Associated with the Closing of Hog Slaughter Plants (North Central Journal of Agricultural Economics)	Marvin L. Hayenga, Ronald Deiter and Cristobal Montaya	1986
Testing for Price Taking Behavior in Input Markets: An Application to the Meat Packing Industry (Presented at the Annual Meeting of the American Agricultural Economics Association	Azzeddine M. Azzam, Emilio Pagoulatos and John Yanagida	1986
The U. S. Pork Sector: Changing Structure and Organization	Marivin Hayenga, V.J. Rhodes, J.A. Brandt, and R.E. Deiter (Iowa State University)	1985
Issues and Developments in the U.S. Meatpacking Industry	Kenneth E. Nelson (USDA/ERS/National Economics Division)	August-85
An Empirical Study of Concentration in the Price Discovery Process of Slaughter Lambs (Western Journal of Agricultural Economics)	Clement E. Ward	1984
Report on the U. S. Red Meat Industry	Temple, Barker & Sloane, Inc.	July 4, 1984
Price Impacts of a Structural Change in Pork Processing - A Case Study in Oklahoma (Current Farm Economics)	Clement E. Ward	1983
Relationship Between Fed Cattle Market Shares and Prices Paid	Clement E. Ward	1982

by Beefpackers in Localized Markets (Western Journal of Agricultural Economics)		
The Effect of Market Share Distribution in Industry Performance-Reexamined	Willard F. Mueller and Douglas F. Greer (University of Wisconsin-Madison and California State University)	May-82
An Economic Analysis of Technology in the Meat Products Industry (American Journal of Agricultural Economics)	V. Eldon Ball and Robert G. Chambers	1982
Monopsony Power in Livestock Procurement: The Case of Slaughter Hogs (Paper Presented ad the Association of Agricultural Economics Annual Meeting, Atlanta, GA)	Steve E. Miller and H.M. Harris	Feb-81
Short-Period Pricing Models for Fed Cattle and Impacts of Wholesale Beef and Live Cattle Futures Market Prices (Southern Journal of Agricultural Economics)	Clement E. Ward	1981
Competition and Regulation: The Development of Oligopoly in the Meat Packing Industry	Mary Yeager	1981
The Effects of Industry Structure on Price: A Case in the Beef Industry (Western Journal of Agricultural Economics)	Dale J. Menkhaus, James S. St. Clair and A. Zahedi Ahmaddaud	1981
Relationship Between Structure and Performance in the Steer and Heifer Slaughter Industry (Staff Report Committee on Small Business, U.S. House of Representatives)	John R. Multop and John W. Helmuth	1980
The Changing Structure of the Beef Packing Industry	Willard F. Williams (TARA, Inc.)	June-79
Small Business Problems in the Marketing of Meat and Other Commodities (Part 3 - Concentration Trends in the Meat Industry)	U.S. Congress, House of Representatives, Subcommittee on SBA and SBIC Authority and General Small Business Problems, 96th Congress, First Session	1979
Small Business Problems in the Marketing of Meat and Other Commodities (Part 4 - Changing Structure of the Beef Packing	U.S. Congress, House of Representatives, Subcommittee on SBA and SBIC Authority and General Small Business Problems, 96th	1979

Industry)	Congress, First Session	
The Changing Structure of the Beef Packing Industry, In Hearings Before the Committee on Small Business in the House of Representatives, Small Business Problems in the Marketing of Meat and Other Commodities, Part 4	Willard F. Williams	1979
Economies of Scale in Beef Processing and Portion Control Operations: Northern California (Extension Leaflet)	James H. Cothern, R. Mark Peard, and John L. Weeks (University of California)	1978
Changing Patterns of Concentration in American Meat Packing (Business History Review)	Richard J. Arnould	1971
Economies of Soze in Nonslaughtering Meat Processing Plants (Agricultural Experiment Station Technical Bulletin T-125)	L.D. Schnake, J.R. Franzmann and D.R. Hammons (Oklahoma State University)	1968
Packer Feeding of Cattle: Its Volume and Significance (Consumer Marketing Services)	Arnold L. Aspelin and Gerald Engelman	November 1, 1966
The Structure, Functions, and Performance of the Meat Packing Industry	American Meat Institute	14-Apr-66
Economics of Scale in Beef Slaughter Plants (Gianni Foundation Research Report)	Samuel H. Logan and Gordon A. King (University of California - Berkeley)	1965
Short-Run Price Effects of a Structural Change in a Terminal Market for Hogs (Journal of Farm Economics)	Harold G. Love and D. Milton Shuffett	1965
Effects of Transportation on Plant Location in the Meat Packing Industry (Discussion Paper)	Wilbur R. Make, William C. Motes and Charles Y. Lui (Iowa State University)	1962
Relation of Profit Rates to Industry Structure in the Food Industries (Journal of Farm Economics)	Lee F. Schrader and Norman R. Collins	1960

NATIONAL ASSOCIATION OF MANUFACTURERS,
Washington, DC, September 27, 2000.

Hon. MIKE DEWINE,
Chairman, Subcommittee on Antitrust, Business Rights and Competition, Committee on the Judiciary, U.S. Senate, Dirksen Senate Office Building, Washington, DC.

DEAR MR. CHAIRMAN: On behalf of the 14,000 members of the National Association of Manufacturers—and the 18 million men and women who make things in America—I ask that you include this letter in the record for today's hearing on S. 2552, the Agriculture Competition Enhancement Act; and S. 2411, the Farmers and Ranchers Fair Competition Act of 2000. The NAM strongly opposes enactment of these measures.

As a general matter, the NAM does not take a position on industry-specific legislation. However, both S. 2252 and S. 2411 threaten sound antitrust principles and include other provisions that would set precedents of general concern.

The NAM is most concerned about granting the Secretary of Agriculture (Secretary) authority to review proposed agribusiness mergers and to impose conditions for merger approval. This directly counters the recent recommendation of the International Competition Policy Advisory Committee (ICPAC), which was composed of highly respected antitrust authorities. In its February 28, 2000, report, a majority of ICPAC members recommended removing what sectoral oversight exists and granting antitrust authority exclusively within the Federal Trade Commission and the Antitrust Division of the U.S. Department of Justice. In addition, ICPAC also extrolled state attorneys general "to resist using the antitrust laws to pursue noncompetition objectives," which is advice that could just as well apply to congressional consideration on S. 2252 and S. 2411. (ICPAC Report, Feb 28, 2000, p. 153.) For these reasons, the NAM strongly opposes sectoralizing antitrust law by establishing an Office of Special Counsel for Agriculture, as called for in S. 2252.

In order to conduct his or her review, S. 2252 would grant the Secretary access to premerger notifications under the Hart-Scott-Rodino (HSR) Amendments to the Clayton Act. The NAM is very concerned about the potential misuse of this highly confidential and proprietary information. While there have never been any leaks by either the Antitrust Division or the Federal Trade Commission, which currently receive the notifications, the potential for such damage would increase by granting additional access.

The sponsors of S. 2411 responded to criticism about granting review of HSR filings by the Secretary of Agriculture by eliminating such access. The current provisions are just as worrisome because the bill would allow the Secretary to promulgate a pre-merger notification system that is duplicative of pre-merger filings with the Federal Trade Commission and the Department of Justice.

Another problematic feature of S. 2411 is the establishment of the Family Farmer and Rancher Claims Commissions, which would review and award claims to family farmers and ranchers for violations of the legislation. This would set a troublesome precedent for other constituencies. Of utmost concern is that the commission's decisions are subject to judicial review only with respect to the amount of the award. Moreover, the commission would be funded out of fines levied for violating the provisions of Section 4, thus giving the U.S. Department of Agriculture incentive to "find" such violations if the commission needs revenue.

Finally, the issue of consolidation is likely to be less important in the future, in light of the increasing significance of global markets for U.S. agricultural products. One in three acres of U.S. farm production is now exported in bulk or value-added food products. USDA projects that U.S. farm income could be as much as $2.5 billion higher by 2005, due to trade agreements. New WTO agricultural negotiations began this year, without which the U.S. would be unable to pursue the elimination of harmful foreign-export subsidies. With passage of PNTR, Chinese tariffs on agricultural products will decline from an overall average of 22 percent to 17.5 percent, while the average duty on agricultural products of United States priority interest will fall from 31 percent to 14 percent. In short, with expanded trade opportunities, farmers will have new outlets for their production.

The NAM believes the effects of these bills go far beyond family farmers and ranchers. The prescriptions in S. 2252 and S. 2411 are bad public policy and should be rejected.

Sincerely,

MICHAEL E. BAROODY,
Senior Vice President,
Policy, Communications and Public Affairs.

PREPARED STATEMENT OF J. PATRICK BOYLE

My name is Patrick Boyle and I am president of the American Meat Institute. AMI has provided service to the nation's meat and poultry industry—an industry that employs nearly 500,000 individuals and contributes about $90 billion in sales to the nation's economy—for more than 94 years.

Among AMI's member companies, 60 percent are small, family-owned businesses employing fewer than 100 individuals. These companies operate, compete, sometimes struggle and mostly thrive in what has become one of the toughest, most competitive and certainly the most scrutinized sectors of our economy: meat packing and processing. In fact, at a hearing earlier this week, USDA's General Counsel Charles Rawls remarked that the meat industry is probably the most studied industry in the U.S. economy. I believe my member companies, who have cooperated with USDA, the General Accounting Office and many other interest groups and academic researchers on numerous studies, would agree with that assessment.

The entire food production, distribution and marketing sector has undergone phenomenal change in the past decade. Consumers have increased their demands for consistent, low-priced products. This has driven consolidation in the retail and foodservice sectors. In turn, food manufacturers have consolidated in an effort to keep pace with their retail and foodservice customers. And many that supply goods or services to food manufacturers—such as farmers, equipment or ingredient suppliers—have also consolidated. We see the same trends in the healthcare, financial services, pharmaceutical, telecommunications, airline, banking, automobile manufacturing and high-tech industries.

My member companies would argue that consolidation is their reaction to intense competition and marketplace realities. It is not—as some would lead you to believe—some sinister plot in and of itself. Tough competition in the meat industry is driving businesses to operate more efficiently and more aggressively than ever before. And sometimes, that has meant that businesses choose to merge or to acquire or to be acquired in order to stay in business.

As you know, Mr. Chairman, mergers and acquisitions are viewed by today's business and investment community as generally good developments, because they help sustain or strengthen businesses, they preserve jobs and many times they keep communities financial healthy. Let's face it—it is better for a struggling meatpacker to merge or be acquired, and stay in business, than for that company to cease operations and release all of its employees. This is especially true in smaller, rural communities where a meatpacking company may be one of the community's larger employers.

Against this economic backdrop, AMI's Board of Directors strongly opposes the agribusiness antitrust bills introduced in the 106th Congress that would create new and different premerger review processes and antitrust enforcement procedures for the agribusiness sector.

With respect to the bills being discussed today, we oppose them because they would:

Dilute the focus and effectiveness of current federal antitrust enforcement;

Unfairly single out the agribusiness community for different antitrust enforcement from the rest of the business community; and

Prolong and potentially politicize antitrust enforcement by inserting the U.S. Department of Agriculture into the pre-merger review process.

REENGINEERING ANTITRUST ENFORCEMENT

S. 2252, the "Agriculture Competition Enhancement Act" introduced by Sen. Charles Grassley last March, gives us many concerns. Against the recent recommendation of the International Competition Policy Advisory Committee (antitrust experts appointed by the U.S. Department of Justice), S. 2252 would place antitrust enforcement authority outside the Department of Justice, creating what we believe would be a needlessly prolonged, duplicative and potentially charged antitrust process.

The proposal would give USDA the ability to oppose the pre-merger review opinions of the USDOJ, thus pitting one federal agency against another. This would add uncertainty to the application of antitrust statutes. It would also give USDA access to pre-merger review documents containing extremely sensitive information about the affected companies (known as Hart-Scott-Rodino filings). Sharing such proprietary information with yet another government agency may well jeopardize their confidentiality, causing damage to the affected companies, their shareholders and investors, as well as their suppliers and customers.

Just last week, GAO issued a report highly critical of USDA's Grain Inspection/ Packers and Stockyards Administration (GIPSA). I want to thank Sen. Grassley for

holding a hearing with GIPSA and GAO representatives earlier this week to explore the report's recommendations. Given the criticisms of GIPSA, however, I would suggest that any efforts to confer greater authority or responsibilities to that agency are, if not ill advised, certainly ill timed.

Finally, S. 2252 reaches beyond agribusiness to affect the entire business community with its proposed increase in Hart-Scott-Rodino filing fees.

Senators Tom Daschle and Patrick Leahy introduced this past April S. 2411, "The Farmers and Ranchers Fair Competition Act." This bill proposes even broader changes to antitrust enforcement than S. 2252, not only for agribusinesses, but also for agriculture-related businesses. It would affect all business that process agricultural commodities, as well as those who do business with the agricultural sector. For example, it would require businesses as diverse as banks, textile manufacturers, food processors, supermarkets, paper mills, tobacco companies, seed companies and farm machinery manufacturers to file separately with USDA (in addition to the USDOJ) for pre-merger review and approval. It would require those same businesses to disclose highly confidential information about contractual relationships and business alliances with USDA each year. And it would extend the reach of USDA's Grain Inspection/Packers and Stockyards Administration to enforce fair trading practice and competition statutes among all agricultural commodities.

UNINTENDED CONSEQUENCES

While both bills were crafted to assist rural Americans, we believe they will have quite the opposite effect. It is important to remember that a merger or acquisition often is the only way to preserve a sales outlet or an input supplier for America's farmers. We believe these bills will have a chilling affect on the already financially-ailing agribusiness sector by creating obstacles to mergers and requiring the sharing of proprietary business information. Stalling mergers will impede the flow of capital investment to the agribusiness community and may well drive struggling businesses to close their doors rather than wade through a new morass of complicated pre-merger approval processes. The customers and input-suppliers of America's farmers will be hurt, and this will hurt, not help, America's farmers.

THE IMPORTANCE OF INTERNATIONAL TRADE

Exports hold the key to the future growth and viability of the U.S. livestock and meat industry. In fact, it is clear that the export market will be the primary engine of future growth in our industry. Whether we like it or not, the long-term viability of the sector depends on our ability to compete in world markets. U.S. exporters struggling for a share of many of the promising, newly invigorated markets in the Far East are facing ferocious competition from Canadian, Australian, New Zealand, Danish and Argentine meat marketers. To the extent the U.S. government adopts policies that increase the regulatory burden on U.S. meat producers and processors or impede structural adjustments that promote efficiency, U.S. meats become more costly and less competitive in foreign markets and we risk losing all-important market share.

We should remain focused on the fact that we are participating—or attempting to participate—in a global marketplace. Misguided decisions, intended to benefit one segment of the industry, could easily backfire to the detriment of the entire industry if such actions have the ultimate effect of pricing our meat products out of international markets.

CONCLUSION

Senator DeWine and members of this subcommittee, the meat industry is but one of numerous sectors in the agribusiness community that would be hurt by these antitrust bills, In addition to AMI, these bills are opposed by organizations as diverse as the antitrust section of the American Bar Association, to the National Association of Manufacturers, the U.S. Chamber of Commerce, the Grocery Manufacturers of America, the Food Marketing Institute and virtually all food and commodity processing organizations. I urge you not to single out the agribusiness community for a different approach to premerger reviews and antitrust enforcement. Thank you for the opportunity to appear before you today.

Senator DEWINE. Mr. Boyle, thank you very much.

Mr. Swenson, I am sure you agree with everything Mr. Boyle said, right?

STATEMENT OF LELAND SWENSON, PRESIDENT, NATIONAL FARMERS UNION, WASHINGTON, DC

Mr. SWENSON. Thank you, Mr. Chairman. For the record, no. [Laughter.]

Senator DEWINE. Somehow I did not think you did.

Mr. SWENSON. Let me commend you for holding this hearing. And if I may, I would request that my testimony, in whole, will be included——

Senator DEWINE. We will make that as part of the record.

Mr. SWENSON. And I would also like to request consent to display a chart that will accompany my testimony.

As said by Senator Grassley, as we listen to farmers across this country, low commodity prices, which today provide less in market price receipts than is the cost of production, concentration is the next issue of importance. And its impact in reducing competition is right up there with concern of low prices. Let me just say that as we take a look at this issue, there are several bills that have been introduced to improve antitrust enforcement, and we urge Congress to take action to approve these bills.

Let us take a look at the state of competition. Competition is rapidly diminishing. The chart that is up there, and Secretary Glickman referred to some of this, but pork, as we take a look at four firms, they control 57 percent of pork slaughter; 62 percent of flour milling; 73 percent of sheep slaughter; 80 percent of soybean crushing; 81 percent of beef slaughter. This is the state of competition that is diminishing for independent producers.

I would just point out Smithfield Farms, the largest hog processor, is also the largest hog producer, producing for themselves 60 percent of the hogs that they need for slaughter. So independent hog producers are relegated to a role of residual supplier. And as pointed out by the president of the Ohio Farm Bureau, many of those contracts that exist for independent producers are set on a price discovery system which no longer exists because of the amount of hogs now being provided under contract or produced themselves.

Farmers are impacted by concentration not only in the marketing sector, but in the input sector as we see more concentration in seed, and herbicides, and fertilizers and fuels. And I have already emphasized the impact on markets. But we can go beyond that now to say that the concentration issue is not only affecting farmers, but also consumers.

So what is happening in the retail sector? Five grocery chains today now control 42 percent of the U.S. grocery market. Now, they all say that greater efficiency and lower consumer prices are a result. Well, not true. Dr. Taylor pointed out, from Auburn University, that over the last 15 years retail costs of the market basket of food has increased 3 percent in real dollars. Farm value for that market basket decreased 36 percent.

August 15 of this year, the Wall Street Journal had an article—I hope that you have seen it—that says, "Is the high price of milk a byproduct of supermarket merger?" And really what it points out is that in the survey done in the Chicago market that the average consumer was paying 30-percent more than consumers in Milwaukee, 92 miles down the interstate, and that the milk came from

the same producers who are receiving a substantially lower price for the milk they produce. So concentration issue is going well beyond the agricultural sector.

But let me just say in conclusion, what can be done? We urge your action and support of the legislation by Senator Grassley, Senator Daschle, and Senator Leahy and others. We hope that these bills can be incorporated as one and passed. We urge action and support of the legislation introduced by Senator Johnson that would limit packer ownership of livestock. And attached to my testimony are charts that show the impact of captive supply versus what happens to cash prices, and I urge you to review those charts.

We also urge you to consider legislation by Senator Daschle, and Senator Hatch and others to allow the Interstate shipment of State-inspected meat. We also encourage improvement in enforcement of the Packers and Stockyards Act through increased staff and funding and to support the effort of Senator Grassley in improving the action on Packers and Stockyards, and also within the Department of Justice to make sure they have the appropriate staff and funding.

We urge provision to also be included in law to remove the *Illinois Brick* restriction to enable the indirect seller and buyer to recover damages. We also have a list attached to my testimony that includes other areas that we think can be addressed, such as contract production, removal—review of mergers and acquisitions, slotting fees.

And if I can, in closing, say one other challenge facing, I think, you, as the chairman of the subcommittee and a member of the committee, is to look at international antitrust laws. Many of the companies we are dealing with are not just domestic; in fact, some are now owned internationally. And we believe if we are going to have fairer trade rules and opportunities, we are going to have to look at the control on an international basis of some of these corporations.

So thank you, Mr. Chairman. I look forward to answering any questions.

[The prepared statement and attachments of Mr. Swenson follows]

PREPARED STATEMENT OF LELAND SWENSON

Thank you Mr. Chairman for holding this hearing on the antitrust implications of agricultural concentration. I am Leland Swenson, president of the National Farmers Union and I am testifying on behalf of the 300,000 farm and ranch families that comprise our membership.

Price and competition are the two issues that concern our members the most. The rapid pace of agricultural concentration has played a huge role in reducing competition, and consequently reducing market prices. Concentration has also harmed producers in their role as consumers, through reduced choices and increased costs for agricultural inputs. There is no doubt the antitrust implications are enormous and must be addressed through improved antitrust enforcement and stronger antitrust authority for the United States Justice Department and the Federal Trade Commission. The United States Department of Agriculture should also be granted additional authority and resources to join in the fight against antitrust violations and anti-competitive behavior.

I am pleased that several bills have been introduced to improve antitrust enforcement and I urge Congress to take action to approve these bills. My testimony today will address 3 items:

1. State of competition in agriculture, including impact of retail consolidation;
2. Pending legislation to improve market competition; and

3. Additional actions necessary to promote competition and fight antitrust violations.

STATE OF COMPETITION IN AGRICULTURE

Competition in the agricultural sector is rapidly diminishing. Four firms control 81 percent of all beef slaughter, 73 percent of sheep slaughter, 57 percent of pork slaughter, 62 percent of flour milling, and 50 percent of broiler production. (See attached Heffernan CR–4 tables.)

Summarized Table of Top Four

Beef packers	Cattle feedlots	Pork packers	Flour milling	Broiler production
IBP, Inc	Continental Grain	Smithfield	ADM Milling	Tyson Foods.
ConAgra	Cactus Feeders Inc	IBP, Inc	ConAgra, Inc	Gold Kist.
Excell Corp. (Cargill)	ConAgra Cattle Feeding.	ConAgra (Swift)	Cargill Food Flour Milling.	Perdue.
Farmland National	National Farms, Inc	Cargill (Excel)	Cereal Food Processors.	Pilgrim's Pride.

The high levels of horizontal concentration are made even worse by the accompanying vertical integration that is taking place in the industry. For example, Smithfield Farms, the largest hog processor is also the largest hog producer. Consequently, 60 percent of the hogs slaughtered by Smithfield, are hogs produced by Smithfield. This relegates independent hog producers to the role of residual supplier, leaving producers to get the best price they can in a market with an artificially low demand side.

Farmers and ranchers are affected by market concentration both as consumers and suppliers. They are consumers when they buy their inputs, such as seed, herbicides, fertilizer, fuel, machinery, etc. They are suppliers when they attempt to market their commodities. Due to the large number of consolidations, net farm income has been squeezed on both the expense side and the market side.

Rapid consolidation is occurring in nearly every sector. Examples of recent mergers and proposed mergers affecting agriculture include:

- Smithfield Farms/Murphy Family Farms (pork)
- Smithfield Farms/Carroll's Foods (pork)
- Philip Morris/Nabisco (processing)
- Case–IH/New Holland (machinery)
- Land O' Lakes—Fluid Division/Dean Foods (dairy)
- Pharmacia & Upjohn/Monsanto (chemical inputs)
- Cargill, Inc./Continental Grain (grain)

RETAIL CONSOLIDATION IS AFFECTING PRODUCER AND CONSUMER PRICES

In addition, rapid consolidation at the retail level is changing the food distribution and marketing structure. At the retail level, the top five grocery chains now control 42 percent of the U.S. grocery market.[1] By comparison, the top five food retailers accounted for 20 percent of food sales in 1993.[2]

In the past, certain marketing sectors in agriculture were dominated by producer cooperatives. This meant that farmers, through their cooperatives could help set the price. However, as the retailers become increasingly consolidated, they are forming alliances with the cooperatives, and as a result, the retailers are becoming the price setters for producers.

Occasionally, some try to argue that consolidations and mergers are justified by increased efficiency. This argument has two major flaws. First, the law does not allow efficiency to justify violations of antitrust law. Second, agricultural consolidation has not resulted in lower prices to consumers. Although farm families today are seeing low prices across many different commodities, these low prices have not translated to consumer savings. Instead, farmers and ranchers are receiving an ever-diminishing share of the consumer dollar, while processors and retailers gain more of the consumer dollar share. Dr. Robert Taylor, an agricultural economist at Auburn University, found that over the past 15 years, the retail cost of a market basket of food purchased for home consumption increased 3 percent, while the farm value of that market basket decreased 36 percent.

[1] Supermarket News, January 24, 2000.
[2] Nutrition Today, May 2000.

Too often, people automatically equate mergers and consolidation with market efficiency. In too many cases, the opposite is true. As firms grow in size, they buy out their competitors, reducing the number of options in the market place. They exert market power to get special deals from their suppliers—money that must then be made up by charging the smaller firms more to do business. They also exert market power on the consumer.

The Wall Street Journal printed an article on August 15, 2000, with the title, "Could the High Price of Milk Be a Byproduct of Supermarket Mergers?" The Journal reported that Chicago families were paying a record high $3.69 per gallon of whole milk at Jewel and Dominick's, the two chains that dominate the Chicago market.

At the same time, farmers in the Midwest, who supply the milk, are receiving the lowest milk prices in two decades. Nationally, the all-milk price for this year will average $12.40 per cwt., which is just over $1 per gallon. Obviously farmers are not the reason for the high milk price paid by Chicago consumers.

Jewel and Dominick's were both acquired by larger companies in the past two years. Jewel was purchased by Albertson's, the nation's second biggest supermarket chain. Dominick's was purchased by Safeway, the nation's third largest chain.

The high prices charged by Jewel and Dominick's have had an additional impact by serving as an umbrella for other supermarkets in Chicago. USDA estimates that consumers in Chicago paid an average of 30 percent more than consumers in Milwaukee over the past year. The cities are 92 miles apart and supplied by the same group of farmers. Chicago's dairy consumers clearly did not benefit from supermarket consolidation.

PENDING LEGISLATION

Two antitrust bills introduced last spring address the lack of competition in the industry—one by Senator Grassley, S. 2252, the "Agriculture Competition Enhancement Act", and the other by Senators Daschle and Leahy, S. 2411, the "Farmers and Ranchers Fair Competition Act of 2000". We strongly support these bills and hope that the provisions of both bills can be incorporated into one bill, reported by this committee and passed by the Senate.

One week ago, Senator Grassley introduced S. 3091, legislation to improve enforcement of the Packers and Stockyards Act by the Grain Inspection, Packers and Stockyards Administration. We agree that enforcement needs to be strengthened. We would like to see additional provisions incorporated into the bill to strengthen the prohibition on preferential pricing and increase funding for enforcement activities.

In addition, we support legislation that is focused on addressing single issues, such as S.1738, legislation introduced by Senator Tim Johnson to limit packer ownership of livestock, and S.1988, legislation by Senators Daschle and Hatch to allow for interstate shipment of state-inspected meat. These bills also deserve prompt consideration by Congress to help level the playing field for livestock producers and increase competition in the packing industry.

NFU POSITION ON S. 2252

S. 2252, introduced by Sen. Grassley, is a good start as it seeks to establish a Special Counsel for Competition Matters within the Department of Agriculture, provide for the review of agricultural mergers and acquisitions by the Department of Agriculture, and outlaw unfair practices in the agriculture industry.

It is important to have a point person in charge of competition at USDA to ensure that these issues receive the utmost attention. We believe it is critical to include the impact on farmers and ranchers when considering whether to allow a proposed agricultural merger.

NFU supports providing the opportunity for USDA to review pending mergers and acquisitions, with attention given to the impact the merger will have on agriculture. In order to make the review effective, the Special Counsel will need to be given both staff resources and statutory authority to file suit to prevent or restrict a merger. The authority specified in Sec. 4(i) of the bill establishes the right to challenge a transaction in Federal court, although it does not provide details as to whether a failure by the Justice Department or the Federal Trade Commission to challenge a merger would weaken the Special Counsel's challenge. It also does not specify whether the Special Counsel would have the same authority as the other two agencies to challenge a transaction.

Another key section of the bill specifies a list of prohibited practices. This section can be strengthened by expanding the remedies allowed. Current language allows the Secretary to issue a cease and desist order and assess a civil penalty of not more

than $10,000 per violation. The bill can be improved by providing for restitution or compensatory damages to producers who suffered loss due to the violations. We also support the provision that requires firms with annual sales in excess of $100 million to file a report with the Secretary of Agriculture.

We support prohibiting confidentiality clauses in production contracts, and amending the Packers and Stockyards Act to provide greater protection for poultry growers. We also support provisions that authorize funding for the Special Counsel and increase funding for the Grain Inspection, Packers and Stockyards Administration to monitor and investigate changes in the meat packing industry and to hire litigating attorneys to enforce the law.

Finally, we support establishing an assistant attorney general for agricultural antitrust matters. Although the Justice Department recently created a special Counsel for Agriculture, we support having this position codified in law.

NFU POSITION ON S. 2411

We strongly support S. 2411, the Farmers and Ranchers Fair Competition Act of 2000, introduced by Senators Daschle and Leahy and others.

The bill prohibits anti-competitive practices and establishes a claims commission to provide for compensation for those injured by violations. We believe providing victim compensation is a vital part of the legislation. We are also appreciative of the whistleblower protection.

It further requires the Secretary of Agriculture to conduct a pre-merger producer and community impact analysis for each proposed agricultural merger and prevents businesses from going forward without addressing potential violations identified by the Secretary. We strongly support those provisions as well as the provision that holds violators liable for treble damages.

We also support establishing minimum disclosure requirements for production and marketing contracts, including disclosure of responsibility for environmental damages. Disclosure provisions are becoming ever more important with the increased use of production contracts.

Another provision requires agriculturally-related businesses that do over $100 million of business per year to report all strategic alliances, ownership in agribusinesses, and interlocking boards of directors and lobbyists to the Secretary of Agriculture. The bill also creates a Special Counsel within USDA and authorizes hiring additional staff to implement the legislation. These provisions will assist USDA in better understanding documenting, and responding to agribusinesses concentration.

We also support requiring the General Accounting Office to conduct a study of farm-to-retail price spreads, as well as an analysis of the impact that formula contracts, marketing agreements, forward contracting, biotech patents, concentration in milk processing, and multinational mergers have on competition. Understanding these trends is essential to developing an effective response to restore strong and competitive markets.

In summary, S. 2252 is a step in the right direction and will be strengthened by incorporating provisions from S. 2411 that are necessary to restore market competition and revitalize our communities.

In addition, we recommend adding a provision to the antitrust bills that will remove the Illinois Brick [3] restriction so that indirect purchases can recover damages due to overcharges and indirect sellers can recover losses due to underpayments. The provision should also provide for class actions by the injured parties. These provisions will become more important than ever to producers and consumers if retailers are allowed to continue their race to consolidation.

OTHER LEGISLATION

In addition to the bills that focus on strengthening GIPSA and antitrust enforcement, there are two bills that respond to specific concerns within the livestock and meat industry. Senator Tim Johnson's legislation would make livestock markets more competitive by prohibiting packer ownership of livestock beyond the 14-day period prior to slaughter. This would prevent packers from flattening the demand curve by using their own cattle in times of increased demand.

Producers are extremely concerned about the price-depressing impact of packer ownership of livestock and other forms of captive supply. The attached charts graphically demonstrate the impact of captive supply on producer prices. The charts show that a high level of captive supply results in a low producer price, while a low level of captive supply is accompanied by an increased producer price. (See the attached charts that demonstrate how price and captive supply levels relate.)

---

[1] Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977).

We are also very supportive of legislation to enable state-inspected meat to be sold across state lines. Since all plants now have to comply with the requirements of Hazard Analysis Critical Control Points (HACCP), we believe it is the right time to enact this legislation. The change will open up more choices to consumers and provide more markets for producers and small packing plants. This legislation has wide support and we urge Congress to pass this legislation yet this session.

OTHER ACTIONS RECOMMENDED TO INCREASE FIGHT ANTITRUST AND INCREASE COMPETITION

1. Enact law to repeal the Illinois Brick restriction, to allow indirect purchasers to recover damages due to overcharges and indirect sellers to recover losses due to underpayments.
2. Enact a moratorium on agricultural mergers, acquisitions, and marketing alliances involving companies with gross revenues of $100 million or more, until Congress can review the impact these mergers are having on farmers, ranchers and rural economies.
3. Prohibit packer-ownership of livestock.
4. Provide funding necessary to ensure the implementation of mandatory price reporting legislation passed by Congress last year.
5. Require USDA to collect and report levels of concentration in all areas of agriculture including the production, processing, and supply industries.
6. Require firms seeking approval from the Justice Department (DOJ) or the Federal Trade Commission (FTC) for a merger or acquisition to disclose of all joint ventures, marketing agreements and strategic alliances.
7. Establish a level of concentration that triggers the presumption of an antitrust violation.
8. Require public disclosure of justification by DOJ and FTC whenever they determine mergers will not be challenged.
9. Require an economic impact statement detailing the expected impact a merger will have on net farm income of farmers and ranchers prior to approval by DOJ or FTC.
10. Require country of origin labeling of all meat and meat products.
11. Improve accountability of publicly funded agriculture research programs to ensure they are benefiting farmers, ranchers, and rural communities.
12. Prohibit the use of USDA rural development grants for creation of factory farms.
13. Pass legislation to bring poultry under the jurisdiction of USDA Grain Inspection, Packers and Stockyards Administration (GIPSA).
14. Pass legisaltion to allow contract producers to form collective bargaining units to negotiate with integrators.
15. Provide information, training, and financial assistance in the forms of grants and loans to foster the formation of cooperatives and other key small businesses in rural communities.
16. Prohibit slotting fees, i.e., the large fees charged to suppliers to put their products on the store shelves, to allow value-added cooperatives to compete at the retail level.

CONCLUSION

Again, thank you Mr. Chairman for holding this hearing and for the opportunity to testify today. We look forward to working with Congress and the Administration to strengthen antitrust law and improve enforcement.

CONCENTRATION OF AGRICULTURAL MARKETS
January 1999

William Heffernan, Robert Gronski, Mary Hendrickson
Department of Rural Sociology -- University of Missouri
Columbia, MO 65211 (573) 882-4563
e-mail: HeffernanW@missouri.edu

"CR4" is the concentration ratio (relative to 100%) of the top four firms in a specific food industry. Fifth and sixth top companies are occasionally shown as supplemental information.

BEEF PACKERS [CR4 = 79%]*	Capacity/Day*	Plants*	1990	1995	1998
1. I B P Inc.	38,800	13	72%	76%	79%
2. ConAgra Beef Companies	23,600	8			
3. Excel Corporation (Cargill)	21,800	5			
4. Farmland National Beef Pkg. Co.	8,700	2			
5. Packerland Packing Co.	4,750	3			CR5 = 83%

Source: *Beef Today (Nov-Dec 1998)

CATTLE FEEDLOTS*	Head Office	Capacity / Feedlots
1. Continental Grain Cattle Feeding	Boulder, CO	405,000 / 6 lots
2. Cactus Feeders Inc.	Amarillo, TX	350,000 / 6 lots
3. ConAgra Cattle Feeding	Greeley, CO	320,000 / 4 lots
4. National Farms Inc.	Kansas City, MO	274,000 / 7 lots
5. Caprock Industries (Cargill)	Amarillo, TX	263,000 / 4 lots

Source: *Beef Today (Nov-Dec 1998)

NOTE: At end of 1998, the top 30 operations had pen space to feed 4.89 million head of cattle.

PORK PACKERS [CR4 = 57%]*	1987	1989	1990	1992**
1. Smithfield (Gwaltney, Cudahy, Morrell, Lykes)	37%	34%	40%	44%
2. IBP Inc.				
3. ConAgra (Swift)				
4. Cargill (Excel)				
5. Farmland Industries				
6. Hormel Foods				

**Packers & Stockyards Programs
GIPSA, USDA; February, 1996

CR6 = 75% (NYTimes, 1/7/99)

Source: *National Hog Farmer (March 1998)

PORK PRODUCTION	# of Sows In 1998*	Production Base
1. Murphy Family Farms	**337,000**	**NC, MO, OK, IL**
2. Carroll's Foods	**183,600**	**NC, VA, IA, UT**
3. Continental Grain (inc. PSF)	**162,000**	**MO, NC, TX**
4. Smithfield Foods	**152,000**	**NC, VA, UT**
5. Seaboard Corporation	**125,500**	**KS, CO, OK**

NOTE: The 50 largest producers (assuming their sows each produce 20 pigs a year) market half of the pigs in the U.S.

Source: *Successful Farming (October 1998)

BROILERS [CR4 = 49%]*	*Weekly Production (mil.lb)				CR4		
	1990	1995	1998	*1986	1990	1994	1998
1. Tyson Foods	**74**	**90**	**155**	**35%**	**44%**	**46%**	**49%**
2. Gold Kist	**24**	**45**	**55**				
3. Perdue Farms	**24**	**42**	**47**				
4. Pilgrim's Pride	**16**	**25**	**35**				
5. ConAgra Poultry	**32**	**35**	**30**				
6. Wayne (Continental Grain)	**11**	**20**	**25**				**CR6 = 58%**

Sources: *Feedstuffs (Annual Reference Issues)

TURKEYS [CR4 = 42%]*	Million lbs live	*1988	1990	1992	1994	1996
1. Jennie-O Turkeys	**891**	**31%**	**33%**	**35%**	**38%**	**40%**
2. Butterball (ConAgra)	**846**					
3. Wampler Turkeys	**650**					
4. Cargill Turkeys	**514**					
5. Shady Brook (Rocco)	**489**					

Sources: *Turkey World (Jan-Feb issues)

ANIMAL FEED PLANTS

1. Cargill (Nutrena)
2. Purina Mills (Koch Industries)
3. Central Soya
4. Consolidated Nutrition (ADM + AGP)

Sources: Feedstuffs, 10/28/91 and 2/21/94

MULTIPLE ELEVATOR COMPANIES [CR4 = 24%]*

1. Cargill
2. ADM (ADM Milling Co.)
3. Continental Grain
4. Bunge

Control by Top Four:
Capacity in Bushels = 24%
Number of Facilities = 39%
Port Facilities = 59%

Source: *1997 Grain & Milling Annual (Milling & Baking News)

FLOUR MILLING [CR4 = 62%]*	Mills	Daily Capacity	**1982	1987	1990
1. ADM Milling Co	30	311,300 cwts	40%	44%	61%
2. ConAgra, Inc.	29	264,900 cwts			
3. Cargill Food Flour Milling	18	223,000 cwts			
4. Cereal Food Processors, Inc.	9	82,900 cwts			

Sources: *1997 Grain & Milling Annual; **Milling & Baking News, 12/1/92

DRY CORN MILLING [CR4 = 57%]	Plants	24hr. Grind
1. Bunge (Lauhoff Grain)	2	120,000
2. Cargill (Illinois Cereal Mills)	2	95,000
3. ADM (Krause Milling)	2	70,000
4. ConAgra (Lincoln Grain)	3	52,000
5. Quaker Oats	3	45,000

Sources: Corn: Chemistry & Technology (1989)

WET CORN MILLING [CR4 = 74%]* Plants		1977	1982	1987
1. ADM	4	63%	74%	74%
2. Cargill	4	(Census of Manufacturing)		
3. A.E. Staley (Tate and Lyle)	4			
4. CPC	3			

Source: *Milling & Baking News, 1990 Milling Directory

SOYBEAN CRUSHING [CR4 = 80%]*	Plants	States	1977	1982	1987
1. ADM	19	12	54%	61%	71%
2. Cargill	16	12	(Census of Manufacturing)		
3. Bunge	8	5			
4. AGP	6	3			

Source: *Feedstuffs (9/22/97)

ETHANOL PRODUCTION [CR4 = 67%]*	*mil.gal/year	locations
1. ADM	750	IA, IL, ND
2. Williams Energy Services	130	IL, NE
3. Minnesota Corn Processors	110	MN, NE
4. Midwest Grain Products	108	IL, KS
5. Cargill	100	IA, NE

Source: *www.ethanolrfa.org/prodcap.html

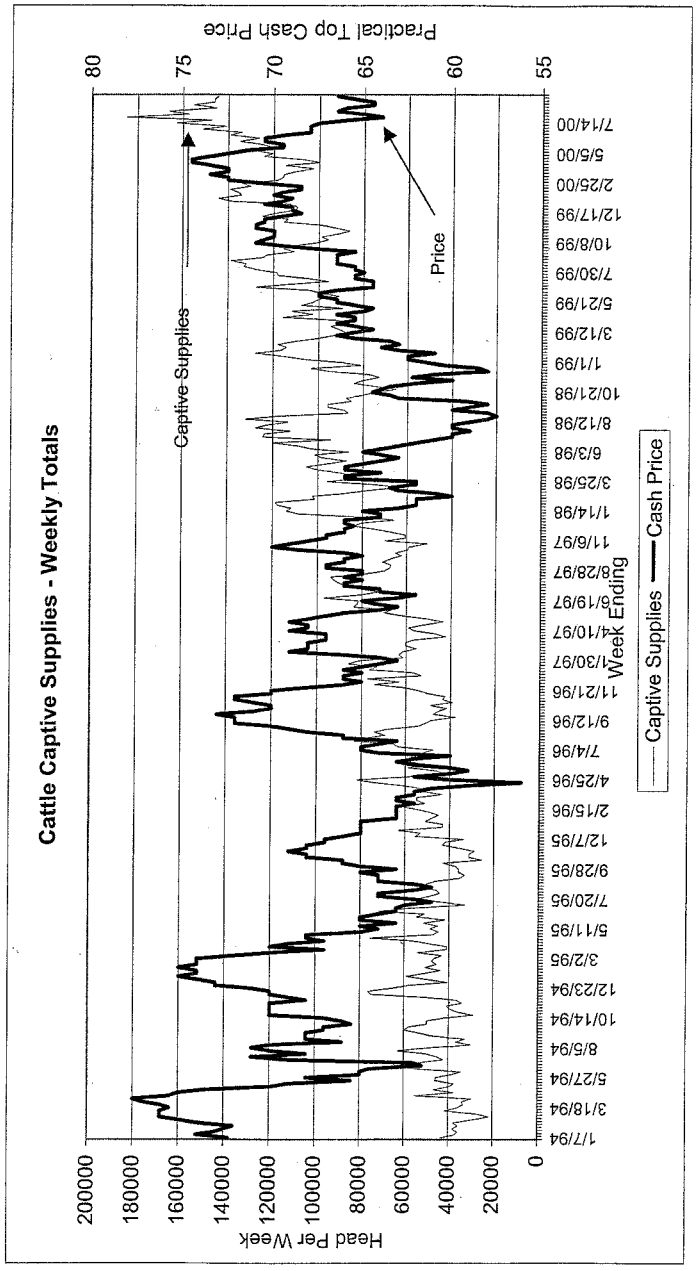

Chart courtesy of Schwieterman, Inc. Garden City, Kansas

The information contained herein is based on data obtained from outside sources believed to be reliable. However, such information has not been verified by us and we do not make any representations as to the accuracy or completeness.

Data Source: AMS and USDA

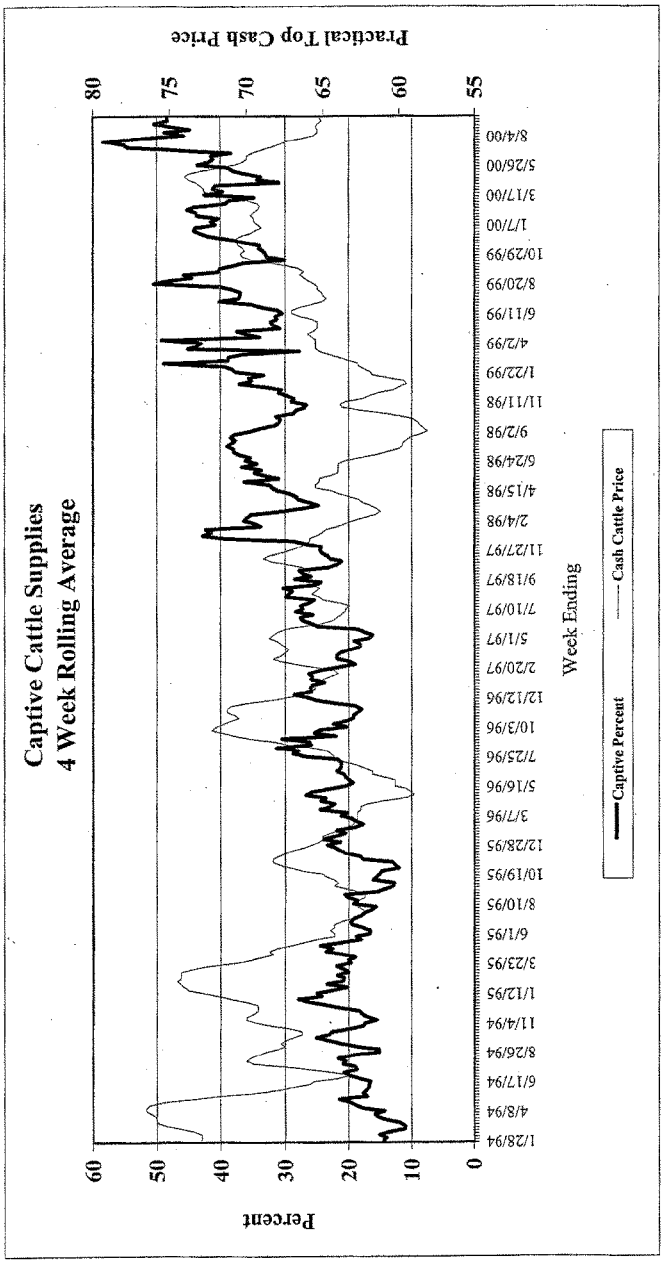

Chart courtesy of Schwieterman, Inc. Garden City, Kansas
The information contained herein is based on data obtained from outside sources believed to be reliable. However, such information has not been verified by us and we do not make any representations as to the accuracy or completeness.
Data Source: AMS and USDA

Senator DEWINE. Mr. Swenson, thank you very much.

Professor.

STATEMENT OF LUTHER TWEETEN, ECONOMIC CONSULTANT AND PROFESSOR EMERITUS, DEPARTMENT OF AGRICULTURAL, ENVIRONMENTAL, AND DEVELOPMENT ECONOMICS, OHIO STATE UNIVERSITY, COLUMBUS, OH

Mr. TWEETEN. Thank you very much for the opportunity to be here today. I have a longer statement, which I presume will be entered into the record.

Senator DEWINE. It will be made a part of the record.

Mr. TWEETEN. Thank you.

There have been a number of studies of the behavior of food marketing in this country, the Food and Fiber Commission, the National Commission on Food and Fiber. They begin usually with the proposition that farmers are exploited by the agribusiness sector. I have been looking into this for a number of years. I have had a number of colleagues who have devoted their careers to studying this very issue. And in a sense, their careers have been wasted because they have essentially found nothing. Now, it is true that they have found imperfect competition. That is no surprise to anybody.

One of the difficulties that we run into is that we look at this from the standpoint of structure, conduct and performance, but we never get beyond structure. We look at the size, number and concentration of firms, and then we make all kinds of inference and innuendo that grows out of that. We scare the heck out of people. But what we really need to look at is conduct and performance.

The performance of the food industry has been exemplary. If markets are not functioning well, we would expect farmers to be earning low returns. The fact of the matter is farmers are earning very good returns as the market would predict that they should—student just-examined data for 1998, the latest year. I had examined earlier years.

Senator DEWINE. What year?

Mr. TWEETEN. 1998. Supposedly a bad year, a year of recession. The rate of return to assets on commercial farms, those with sales of over $250,000 a year, was 7 percent. It was about 3 times the rate of return that small businesses were getting. It also did not include the return on land, and the real capital gain on land was 3 percent, so their total return averaged 10 percent.

Senator DEWINE. Give me those figures again. I think I will be as shocked as some of our fellow citizens in Ohio.

Mr. TWEETEN. It ought to be. It ought to be.

That is a 7-percent return before real capital gains, which adds another 3 percent, for a total 10-percent return. And the top half of those commercial farmers, and we would say that we only expect competent commercial farmers to be earning a return comparable to what they could earn elsewhere, they averaged 19 percent rate of return on their assets. That is pretty good. And many of us college professors would love to settle for that kind of return.

What kind of return has agribusiness been making? Somewhat along that same line. They have been earning not exceptional returns. They are not viewed as a haven for capital, where it ought to turn to for a very high return. But another way to look at this

is these studies of the conduct and performance. The latest studies do something that previous studies had not done, which I think is very useful, and that is they divide the impacts into two; that is, a merger has an effect on economies of size. Other things equal, this ought to reduce marketing margins.

The other effect of mergers is to create marketing power. This should raise marketing margins. The finding of Azzeddine Azzam, Suresh Persaud, is that the mergers, as a whole—and this is in beef, hogs and poultry—have reduced marketing margins; that is, the economies of size effect has predominated. That is not hard to see in the data. If you correct for the services provided and for inflation, real marketing margins have been declining, they have not been increasing.

The good news then is that they have been declining; the bad news is the benefits have not gone to farmers, they have gone to consumers. But what the market does is it rewards farmers what it takes to get the product delivered. In fact, even in theory, if there is a monopoly on both the selling end and the buying end, and the farmer is in between, if farm resources are mobile, and they certainly are, given a period of time, farmers will earn the same rate of return on their investment, with or without this imperfect competition on both ends of their market.

And so we see that sort of pattern prevailing; that is, we see returns are quite good in agriculture for adequate-sized, reasonably well-managed farms. But the question is would you have fewer resources if you had imperfect competition? And the theory says, yes, you would have fewer resources in agriculture. But I submit that we actually have more resources in agriculture and more output, and the reason is that the agribusiness sector is highly innovative in developing new products. It also advertises a great deal.

And that is one of the reasons why I have found in one of my studies which was published in the Journal that Americans, on average, eat 12-percent more than they should over a period of time. So we sell more products than we ordinarily would have if we had perfectly functioning markets and perfectly informed people. So my conclusion is that if there were an atomistic agribusiness structure, we would probably sell less, farmers would receive a lower price for less product.

Now, in final—and my time is up—what should we do? We should be very careful here, maybe take the Hippocratic Oath, do nothing to make the patient worse. I am very much a proponent of transparent markets. So I think there is a lot of merit in taking, say, production contracts and marketing contracts and making that information available to all. I think that kind of competition is really good. And some of the other things—interpreting whether a merger interferes with the ability of farmers to compete, I think those things are very difficult to interpret, and I am really scared of that kind of legislation.

My time is up. Thank you very much.

[The prepared statement of Mr. Tweeten follows:]

PREPARED STATEMENT OF LUTHER TWEETEN

I address three questions:

(1) Are farmers exploited by the agribusiness sector?

(2) Why are farms consolidating and making other structural adjustments?

(3) What, if any, new legislation is needed to help independent producers and family farms compete is the marketplace?

ARE FARMERS EXPLOITED BY THE AGRIBUSINESS SECTOR?

A parable from the 1960s tells of a car owner searching under a streetlight for his lost car keys. Someone asked the car owner if that's where he lost the keys, and he replied "No, I lost them elsewhere." When asked why he was not searching where he lost the keys he said "Because there is no light there."

Populists are searching for their "car keys" under the "light" of market structure—the size, number, and concentration of firms in agribusiness industries. Dramatic presentations of who is merging with whom, and who owns what are being used to scare farmers. The "keys" to the meaning for farmers and society of changes in agribusiness are to be found in the murkier, empirically more obscure, areas of market conduct (predatory and exclusionary behavior of firms) and market performance (innovation, investment in research, efficiency, profit rate, meeting customer needs at low cost) rather than in 4-firm concentration ratios.

To illustrate, I relate an anecdote from a recent trip to the supermarket—an experience much like that of any such trip. The soft drink industry structure is notable for its domination by two firms—Coke and Pepsi. Meanwhile, the bottled water industry structure is characterized by many firms. The important observation, however, is that market performance rather than market structure matters—Coke and Pepsi were selling for 1.5 cents per ounce compared to bottled water at 6 cents per ounce in similar size containers.

The issue is not whether the agribusiness sector contains imperfect competition (it does) or some economic inefficiency (it does). Rather, the question is: Does market structure, conduct, and performance of the agribusiness sector below standards of workable competition contribute significantly to the economic problems of the family farm and consumers? The answer to this question is "no".

The best evidence that farmers are not exploited is that competent commercial farms earn rates of return on resources comparable to what their resources could earn elsewhere. They do not earn the return every year, but averaged over several years. Compelling empirical evidenced reveals that farm resources are highly mobile in the long run of 5 or more years after price shocks (Tweeten 1989, ch. 4), but farm resources are not highly mobile in the short-run of up to five years. Hence farmers experience annual and cyclical periods of low income and rates of return. That annual and cyclical instability results from weather; monetary, fiscal, and trade policy at home and abroad; and from imperfect outlook expectations (commodity and business cycles) rather than from imperfect competition in the private agribusiness sector (Tweeten 1989, ch. 5). Stephen Koontz, an economist who has devoted his career to the study of industry structure, concludes that "Concentration [in agribusiness] is not the cause of low prices and profitability in agriculture" (p. 1). Annual and cyclical instability in prices and incomes is the major economic problem facing commercial farms, and I know of no economic analysis suggesting that it is due too imperfect competition in agribusiness sectors.

It might be argued that farms are earning favorable economic returns only due to government commodity programs. However, the approximately half of agriculture not covered by commodity programs earns as favorable rates of return on resources as do covered farms. A reason is because any perceived long-term benefits of commodity programs are bid into quotas, land prices, and rents. Hence, longer-term benefits of programs are lost to renters and new landowners.

To be sure, commodity terms of trade (defined as the ratio of prices received by farmers for crops and livestock to prices paid by farmers for production inputs) averaged only 26 percent of the 1910–14 average (a longstanding "parity" base period) in 1999. But due to productivity gains from improved farm inputs and management, the output from each unit of farm production resources in 1999 was 3.93 times that in 1910–14. It follows that farm real prices defined as the real price received for the output of farm aggregate input averaged 41 percent higher ($0.36 \times 3.93 = 1.41$) in 1999 than in 1910–14! That, along with increasing farm size and off-farm income made possible by labor-saving farm technology, is the reason why income per farm household from farm and off-farm sources increased to an all time record of $60,912 in 1999, or well over 10 times the 1933 level (adjusted for inflation) and 15 percent above average household income of the nation in 1999. At the same time labor was freed from farming to produce education, entertainment, health care, and other benefits of an affluent society.

Empirical studies do not indicate that farmers are adversely affected by agribusiness structure. The resulting greater agribusiness efficiency reduces market costs and margins. The best of those studies recognizes that agribusiness firm en-

largement and concentration have two general impacts. One is to gain economies of size and scope. The fruits of such economies in the agribusiness sector can go to consumers, farmers, or to the economizing firms.

The second impact of increasing firm size and concentration is to confer market power. That market power potentially can be used by agribusiness firms to pay farmers less for products (or charge more for inputs) or to charge consumers more for food and fiber. Agribusiness consolidation will decrease marketing margins if the impact of size economies prevails and will increase marketing margins if the impact of market power prevails. Whether the economies of size dimension benefiting society or the market power dimension hurting society predominates cannot be answered on theoretical grounds. Fortunately, a number of empirical studies have addressed the issue in recent years.

The most comprehensive and recent studies of the livestock and poultry industries indicate some good and bad news for society. The good news is that cost-reducing advantages of concentration far overshadow the market power effects so that marketing margins are reduced by concentration (see Azzam 1997, 1998, and Schroeter and Azzam for pork and beef; Persaud for poultry, beef, and pork). Using annual data for 1970–92, Azzam (1997) found that the cost-efficiency effects of concentration are twice the market power effects in the U.S. beef packing industry. The bad news for farmers is that benefits of lower marketing margins are passed to consumers rather than to farmers. Agribusiness firms pay what it takes for farms to supply crops and livestock, in the long-run of five years or more that price averages the full cost of production including a reasonable profit on competently managed commercial farms. Farmers will not continue to supply products if their costs are not covered.

Wohlgenant and Haidacher's results were consistent with a competitive food marketing sector for beef and veal, pork, poultry, eggs, dairy, fresh vegetables, and processed fruits and vegetables. Using Wohlgenant's data and econometric specification, Holloway tested for perfect competition in poultry, egg, dairy, fresh vegetable, and processed fruit and vegetable markets. The results were consistent with a competitive market for all the commodity groups tested. Holloway's test was (strictly speaking) not applicable to the beef and pork sectors because a critical assumption was not met. Nevertheless, Holloway maintains that any departures from competition in these sectors have been relatively insignificant. Matthews et al. found that farm prices in the beef sector rise and that farm-to-wholesale spreads fall with greater beef-packing concentration. There was no evidence of exploitative behavior in the marketing sector.

Other rigorous analytical studies of the agribusiness marketing sector corroborate these results. The Grain Inspection, Packers, and Stockyards Administration (GIPSA) of the United States Department of Agriculture used weekly cost and revenue plant-level data from the 43 largest steer and heifer slaughter plants to examine the effects of concentration on prices paid for cattle. "The analysis did not support any conclusions about the exercise of market power by beef packers" (GIPSA). The weekly plant level data collected by GIPSA and the scholarship exemplified by the study were in themselves strong contributions to the literature, as was the finding that cattle prices in local areas are affected very little by differences in concentration in those regions. The findings of strong regional price linkages and rapid price adjustments imply that slaughter hogs and cattle are bought and sold in effectively a single large and integrated geographic market. Thus, the results of studies examining the margin-concentration relationship using national four-firm concentration (or Herfindahl Index) data could carry over to regional markets as well.

Quail et al. (1986, p. 55) earlier estimated that slaughter cattle prices would have been 24 to 47 cents higher per cwt. in four U.S. regions if the regions would have had lower beef-packer firm concentration ratios and hence more competition. Critics strenuously objected to these findings, however. This price increment is probably statistically insignificant and is dwarfed by cattle cycle price swings of $30 or more per hundredweight. Ward and Bullock rejected the conceptual and statistical models used by Quail et al. Ward accused the authors of underestimating economies of size—less concentration might have increased packer costs and reduced beef prices even more. Bullock noted that transportation costs and whether regions are surplus or deficit in beef production relative to consumption were not adequately accounted for by Quail et al. These factors according to Bullock might better explain price differences attributed to concentration and could support the conclusion that the beef packing industry is competitive.

The conduct and performance of farm input supply industries have been studied less than of food processing and marketing industries. A review of farm input industrial organization studies raise no red flags, however, and many of the industries

that supply American farmers are world-renowned for innovation and competitiveness (see Tweeten 1988; 1989, ch. 8).

Economic theory holds that if farm resources are mobile, as they certainly are today, then farms facing imperfectly competitive agribusinesses will still earn resource returns as high as resource returns elsewhere but fewer resources will be devoted to farming than under competitive agribusiness conditions. However, in the real world a case can be made that oligopoly increases the level of farm output, resources, and commodity prices.

Farm input supply and product marketing firms in many instances are oligopolies (few sellers) or oligopsonies (few buyers). Although it is not possible to conclude apriori that oligopoly will be more or less efficient or pay more or less for farm output than would an atomized (numerous firms) market structure, a good case can be made that oligopoly begets extensive product innovation and advertising. Large outlays for food advertising may be one reason why the principal malnutrition problem in the U.S. today is chronically eating too much rather than too little. Although too much eating is socially undesirable, it benefits farmers as producers. A more perfectly functioning market providing optimal nutrition would reduce domestic demand for food by an estimated 12 percent (Finke and Tweeten). An atomized food industry with less product differentiation and promotion, and controlled to serve the public interest likely would reduce the demand and price for farm output on average.

Overall aggregate profits of agribusiness firms that process and market farm products average less than 5 cents out of each dollar spent by consumers for food in supermarkets. Stock market investors are highly perceptive, and they price food processing and marketing firms as slow-growth, low-profit businesses (Koontz, p. 3).

If agribusiness firms are wielding market power to accrue excessive profits, then cooperatives should prosper along with private agribusiness firms. The presence of producer cooperatives reduces chances for exploitation of farmers. Producer-owned cooperatives constitute approximately one-third of farm input and product markets and are prominent in nearly all major categories of farm outputs and inputs. They have not prospered in competition with private firms and indeed many would not survive without help from government. Cooperatives have consolidated at a rapid pace in recent years to compete and survive. A number of cooperatives have integrated vertically to operate in nearly all phases of farm input supply, contracting, product processing, and product marketing. Some cooperatives have consolidated or in other ways grown to a size providing countervailing power against large private firms. In fact, the size and predatory conduct of some large cooperatives has drawn the attention of antitrust agencies in recent decades.

WHY IS CONSOLIDATION OCCURRING?

William Heffernan (pp. 12, 13) expresses concern for farmers over concentration of market power in clusters of agribusiness firms, and predicts that

> . . . as the food chain clusters form, with major management decisions made by a small core of firm executives, there is little room left in the global food system for independent farmers. . . . If the number of [US?] farmers is reduced to about 25,000 in the next decade, there will be many farm families who will be involuntarily removed from their land.

Heffernan's presumption of only 25,000 farms remaining in a decade is premature. The number of farms fell from 1,925,700 in census year 1992 to 1,911,859 in 1997, the latest census year, or at a rate of only 0.14 percent per year (U.S. Department of Agriculture, p. 10). At this rate, 3,096 years instead of Heffernan's predicted 10 years will be required to reach 25,000 farms. The rate of loss of farms, in fact, has slowed as agribusiness concentration has grown.

I know of no empirical study indicating that anticompetitive behavior is causing farms to get larger and fewer. In fact, farms are consolidating for the same reasons that agribusiness and indeed all industries are consolidating. These reasons include availability of large, expensive, indivisible technological and human capital that reduces costs per unit of output. Costs per unit are reduced, however, only if that "lumpy" capital is spread over many units of output.

Firms are consolidating also to gain advantages of task specialization. That is, costs are lower and efficiency higher by having specialists in the respective fields of management, information systems, marketing, finance, and blue-collar activities. An all-purpose family member in a family firm performing each of these tasks will not do so very efficiently. Financing expensive research and development, advertising in national media, coping with risks, meeting government regulations (e.g. food safety and quality, environment), and obtaining access to national venture cap-

ital markets are also reasons to lower unit cost by expanding size through firm growth or consolidation induced by mechanization.

Sometimes, firms utilize production and marketing contracts rather than consolidation to achieve economies of size. Koontz (p. 5) states that "I would argue that little contract production has emerged because of power. It has emerged to produce a product more consistent with low-cost processing systems and consumers wants." Consumers are demanding foods and services tailored to their wants, needs, and lifestyles. Agribusinesses must have farm products at the right time, place, quantity, quality, and price to process and meet consumers' demands. Contracts are a way to meet this demand for products at low transaction costs.

In short, farms consolidate to achieve economies of farm size arising from technology rather than from pressures of (or response to) agribusiness concentration. Even in the highly unlikely case that a less concentrated agribusiness sector would raise farm commodity prices, family farms would not necessarily fare better. Benefits of higher prices would be bid into land prices and higher land prices would make entry impossible for some potential farm operators. Higher commodity prices would bring more machinery, displacing farms through consolidation.

To illustrate further, consider that Japan, with four times the farm commodity support rate of the U.S. lost farms at a 2.2 percent annual rate from 1980 to 1995 compared to a 1.1 percent loss rate of U.S. farms. Major countries of the European Union lost farms at 1.8 percent per year in the same period, despite a commodity support rate twice the U.S. level. High support prices could not offset the forces of technology. It follows that the largest "threat" to family farm numbers is not the perfidy but the productivity of the agribusiness sector in developing a new generation of inputs that function much in the way of tractors, combines, miking machines, hybrids, and pesticides to raise the output of each farmer.

WHAT, IF ANY, NEW LEGISLATION IS NEEDED TO HELP FAMILY FARMS COMPETE IN THE MARKETPLACE?

American agribusiness is the envy of the world and can take pride in helping this nation to supply the highest quality and quantity of food to U.S. consumers at the lowest real cost in the world. Before federal antitrust agencies tamper exuberantly with such a system, it is important to remember the Hippocratic Oath "to do nothing to make the patient worse."

Nonetheless, continuing study is warranted of the structure, conduct, and performance of the farm and agribusiness sectors. Antitrust policies are in place and have been and will be used to stop anticompetitive behavior and consolidation. Price fixing and collusion by ADM appropriately was penalized. Also appropriately, the Department of Justice has required divestiture of some holdings before approving mergers. Further opening of world markets would foster more competition. Additional emphasis needs to be placed on market conduct, however, including conduct of the government (e.g. Northeast Dairy Compact) and cooperatives as well as of private firms.

American competitiveness policies must be doing something right—our industry is rated by three Harvard University professors as the most cost-competitive in the world ("U.S. Most Competitive Nation"). The key is an industry environment where markets drive mergers and divestitures toward greater efficiency. Nearly half of all mergers fail, hence mergers and acquisitions not contributing to efficiency are turned back. It would be most unwise to impose on business decisions the heavy government intervention hand contributing to sclerosis in Europe and other developed countries.

Governments worldwide have a nearly unblemished failure rate in dictating firm size. In East Asia, farms, for example, were set too small by governments to compete internationally. In the former Soviet union, farms were set by government too large to compete internationally. Neither bureaucrats nor I know what is the optimal size for agribusiness firms. The issue is to just plant size, but also entails optimal size for research, innovation, market intelligence, finance, risk management, and a host of other considerations. The market most efficiently makes such decisions.

Of course, restraint of trade such as predatory and exclusionary behavior by firms must be stopped. Vigilance by the U.S. Department of Justice and other agencies is essential. Big is not necessarily better, but neither is it apriori bad.

Proposed legislation to disclose and publish production and marketing contract terms has merit. But I see no more reason to forbid packers to feed animals than to forbid carmakers to produce their own parts. And it makes little sense to force all batches of farm inputs for food processing to be paid the same at all times of the day in a dynamic industry.

Stopping mergers or acquisitions because they "would cause substantial harm to the ability of independent producers and family farms to compete in the marketplace" raises difficult questions. What if a merger causes 10 farms to be lost, but saves taxpayers and consumers billions of dollars? What if a medium-size but well financed machinery company wishes to purchase a small, but financially struggling firm holding the patent on an innovative labor-saving machine that is likely to reduce the need for farm family workers and massively cut farm input costs? What does "substantial" mean in the definition? Given these and other definitional problems, farmers and the nation are better served without such legislation.

CONCLUSIONS

Farming has been far more influenced by favorable performance of agribusiness bringing increased productivity than by unfavorable conduct bringing high farm input prices or low commodity prices through market power.

To be sure, farmers experience annual and cyclical economic setbacks. The economic instability that is the heart of commercial farm problems is not the product of a concentrated agribusiness sector or of productivity gains. Weather, government policy, and business and commodity cycles are the villains.

The major source of decline in number and increase in size of family farms has been technology, especially farm machinery. Such technology is the result of ingenuity and is not the result of monopoly structure or subpar performance of agribusiness. Scale-influencing technologies would have caused losses in commercial farm numbers even if farm prices would have been much higher. Productivity gains have brought massive national income benefits to society as a whole and hence to farmers in the long run because farm income per capital has trended toward national income per capita. A major source of the spectacular rise in farm household income since the 1930s has been labor-saving technology that has freed farmers to operate larger units and work off farms.

One cannot help but be struck by the stark contrast between vilification of agribusiness industries by populists and the absence of evidence justifying such vilification through numerous in-depth economic studies of agribusiness. There is no evidence that farm problems of annual and cyclical income instability and squeezing out of commercial family farms would be any different today if the agribusiness sector acted as if it were perfectly competitive. Evidence indicates that an increasingly concentrated structure of agribusiness has maintained high performance measured by innovation, rising economic efficiency, and falling real marketing margins—corrected for additional food processing that consumers demand.

REFERENCES

Azzam, Azzeddine. 1998. "Competition in the US Meatpacking Industry: Is it History?" Agricultural Economics 18:107–126.

Azzam, Azzeddine M. 1997. "Measuring Market Power and Cost-Efficiency Effects of Industrial Concentration." The Journal of Industrial Organization. 45: 377–386.

Bullock, J. Bruce. 1986. "Evaluation of NC 117 Working Paper WP–89." (Mimeo) Columbia: Department of Agricultural Economics, University of Missouri.

Finke, Michael and Luther Tweeten. 1996. "Economic Impact of Proper Diets on Farm and Marketing Resources." Journal of Agribusiness 12:201–207.

GIPSA (Grain Inspection, Packers, and Stockyards Administration). 1996. Concentration In the Red Meat Packing Industry. Washington, DC: GIPSA, US Department of Agriculture.

Heffernan, William. 1999. Consolidation in the Food and Agriculture System. Report to the National Farmers Union. Columbia: Department of Rural Sociology, University of Missouri.

Holloway, Garth J. 1991. "The Farm-Retail Price Spread in an Imperfectly Competitive Food Industry." Amer. J. Agr. Econ. 73: 979–989.

Koontz, Stephen. 2000. Concentration, Competition, and Industry Structure in Agriculture. Testimony at Agricultural Concentration and Competition Hearing, April 27, 2000. Washington, DC: Committee on Agriculture, Nutrition, and Forestry, US Senate.

Matthews, K.H., W.F. Hahn, K.E. Nelson, L.A. Duewer, and R.A. Gustafson. 1999. "US Beef Industry: Cattle Cycles, Price Spreads, and Packer Concentration." TB–1874. Economic Research Service, US Department of Agriculture.

Organization for Competitive Markets. March 2000. Newsletter. Lincoln, NE: OCM.

Persuad, Suresh. 2000. Investigating Market Power and Asymmetries in the Retail-to-Food and Farm-to-Retail Price Transmission Effects. PhD Dissertation. Co-

lumbus: Department of Agricultural, Environmental, and Development Economics, Ohio State University.

Quail, Gwen, Bruce Marion, Frederick Geithman, and Jeffery Marquardt. May 1986. "The Impact of Packer-Buyer Concentration on Live Cattle Prices." NC 117 Working Paper WP–89. Madison: Department of Agricultural Economics, University of Wisconsin.

Schroeter, John and A. Azzam. 1991. "Marketing Margins, Market Power, and Price Uncertainty." Amer. J. Agr. Econ. 73: 990–999.

Tweeten, Luther. 1988. "Is the Family Farm Being Squeezed Out of Business by Monopolies?" Pp. 213–243 in Volume 8, Research in Domestic and International Agribusiness Management. Greenwich, CN: JAI Press.

Tweeten, Luther. 1989. Farm Policy Analysis. Boulder, CO: Westview Press.

Ward, Clement, 1986. "The Impact of Packer-Buyer Concentration on Live Cattle Prices: A Review and Comments." (Mimeo) Stillwater: Department of Agricultural Economics, Oklahoma State University.

Wohlgenant, Michael K. and R.C. Haidacher. 1989. "Retail to Farm Linkage for a Complete Demand System of Food Commodities." TB–1775. Economic Research Service. US Department of Agriculture.

US Department of Agriculture. 1999. 1997 Census of Agriculture: United States Summary and State Data. AC97–A–51. Washington, DC: National Agricultural Statistics Service, USDA.

"US Most Competitive Nation." Sept 7, 2000. Columbus Dispatch. Columbus, Ohio, pp. D1, D2.

Senator DEWINE. Thank you very much.

Professor.

STATEMENT OF PETER C. CARSTENSEN, GEORGE H. YOUNG-BASCOM PROFESSOR OF LAW, UNIVERSITY OF WISCONSIN LAW SCHOOL, MADISON, WI

Mr. CARSTENSEN. Thank you very much, Senator. It is quite an honor to be here. I will disclaim Senator Kohl's claim for me that I am a great expert, though. Since I am the only antitrust professor who seems to be paying much attention to the field, I suppose I am a monopolist. [Laughter.]

What we have heard today, and what I have read and seen, show us that America's farms and ranches face rapid consolidation, both the markets into which they sell and the markets from which they must buy goods and services. And we have talked some about dairy, the examples from New England, the Milwaukee-Chicago comparison. These are serious problems, it seems to me, in terms of the allocation of wealth within the production process.

There is a great deal to be said about the livestock area with respect—I think I disagree with Professor Tweeten—about the implications in the most recent data that I have seen suggested that the margins for meat packers were going up in the most recent time periods without there being any significant change in what they are doing, but they are raising their margin.

Another point that has been made that we really need to be focused on is concentration in the grocery industry and grocery retailing because that gets reflected back up the stream, in terms of buying power, which is the central kind of competitive concern we have here. There have been other committees of Congress which have been focused recently on slotting allowances, a very serious problem. And I am glad that there have been references made here to the supply side, and especially to some of the concentration in the biotech area, which I think is a serious source of concern, although I think it is beyond the scope of the Department of Agri-

culture or even antitrust legislation to address some of those issues.

Moving past the kind of descriptive material that we have been talking about in terms of the existence of problems, I see five policy issues that need to be addressed, and I think the proposed legislation does address significant parts of that.

The first thing that we need to have from our law enforcers is full recognition of the risk of buying power. This is coming. The Cargill-Continental analysis focused in on that. The Federal Trade Commission just won the Toys R Us case where, again, it was a buying power issue. The analysis of relevant market share of how you approach buying power is going to be very different from selling power. And one of the problems is to get the enforcement agencies to think critically and in an informed way about what is involved there.

We need, second, just plain stricter merger enforcement, both at the level of making decisions, and I have referenced in my written statement which I, like everyone else, assume will be included in the record——

Senator DEWINE. It will be.

Mr. CARSTENSEN [continuing]. A butter case as one example of one that was not pursued and a soybean seed germ case, another example of a case not pursued at the initiation level.

The second problem, in some ways triggers the proposed legislation before you, is the bad resolution of these cases; that is, instead of blocking mergers, one big guy gets to slice and dice another big guy. At the end of the day, we really have seen a consolidation of competition, and an increase in concentration and a failure, really, to protect some of the farmer interests.

Third, it seems to me we need to have more concern for—and here I think Professor Tweeten and I may even have some agreement—some of the contracting that is going on, what are the competitive implications of strategic alliances, of undisclosed contractual arrangements in these vertical arrangements that I think are going to be significant.

Senator DEWINE. Excuse me. We have two professors who agree at this moment. [Laughter.]

Is there anyone who disagrees on this panel with the transparency issue?

Mr. Boyle. Mr. Gibbs.

[No response.]

Senator DEWINE. OK. We are unanimous here.

Mr. CARSTENSEN. A rare occurrence, I suspect.

Senator DEWINE. It is good. It is a good thing.

Mr. CARSTENSEN. The fourth policy problem, and it is the one that goes to the PSA proposed amendment and the addition of other areas of agriculture, is the problem of unequal access and discriminatory treatment. This may not result in things which conventional antitrust regards as an unlawful merger, an unlawful restriction on competition. It has to do with fairness and access.

And it seems to me that is where—and I have tried to sketch this out in more detail in my written comments—we need to have legislation that will be focused on equitable treatment, on better access, especially as markets become more concentrated, whether it is

dairy, meat, grain or whatever. So that I think that the advantage of the two proposed legislations, either bill, is that it would expand the kind of protection and focus on inequitable access, unfair terms and conditions, across the whole area of agricultural product. And I think that that is very much to be desired.

Lastly and briefly, it is essential to have the will to enforce the law and the resources to enforce the law. And I have been concerned about both the antitrust enforcers' will—and frankly, when they have the will, the resources—and I have also been concerned about the Department of Agriculture's will and capacity to organize their resources, as well as adequacy of resources. I was very encouraged by what the Secretary said today because at least he is talking the talk of better enforcement. I do urge on the committee that antitrust and competition is not cheap. You need the lawyers, you need the staff to do it. Both the enforcement agencies and the Department of Agriculture need the resources to pursue these areas there because they are complicated and they require a complex balance.

Senator DEWINE. Professor, do you want to give us an example of where you think Justice should have moved in the area of agriculture and where they did not.

Mr. CARSTENSEN. Well, I guess I would start, one of the problems, obviously, I do not have access to as much of the data as they do.

Senator DEWINE. I understand. Sure. Sure.

Mr. CARSTENSEN. They chose to sue a small butter merger involving branded butter in New York and Pennsylvania, but allowed Land O' Lakes to acquire a butter manufacturer in my hometown, Madison, WI, Madison Dairy Produce, that makes 15 percent of the butter in the United States. And it seems to me there is a merge that really deserved much more serious and critical examination because it was both horizontal, and vertical and involved serious foreclosure.

A second example, Monsanto, which is the dominant firm in providing herbicide-tolerant soybean seed or herbicide-resistant soybean seed, was allowed to buy, and I believe the name of the company is AsGro, but I forgot my note that had the name on it, which is the primary supplier of seed germ for soybeans. There are two competitors to Monsanto in the business of providing herbicide-tolerant soybean seed. They are now having to look to Monsanto for the seed germ that they need to develop the competing products. That makes it much harder for farmers to get competitive seed supplies.

[The prepared statement of Mr. Carstensen follows:]

PREPARED STATEMENT OF PETER C. CARSTENSEN

PREFACE

I am a generalist with respect to competition law and policy, having studied a variety of industries and legal issues in the course of my career. This background allows me to place many of the questions concerning competition in agriculture in the broader context of recurring competition policy issues that confront our economy, with its reliance on the marketplace as the primary institution for allocating goods and services.

In the last year and a half, I have become substantially more focused on the specific competitive issues that confront agricultural markets on both the input and

output side.[1] As a result, I have been reading a great deal about these issues from a variety of perspectives as well as learning from many experts in the field. I also bring a modest background in some aspects of these issues. As a government lawyer some 30 years ago, I reviewed the old meat packing consent decree. In 1995, I served in Wisconsin on a committee that reviewed and proposed modifications for the regulations governing contracts for vegetables being purchased for canning. I have also done an extensive examination on the grain marketing industry in connection with a study of the famous Chicago Board of Trade decision which is a landmark antitrust case.[2] In addition, my work on the competitive implications of other kinds of vertical distribution arrangements has provided me with relevant background on some of the key issues being considered today.[3] Most recently, September 21, 2001, I was one of six invited academic experts in the U.S. Department of Agriculture's Public Forum on Captive Supplies held in Denver, Colorado. We were asked to evaluate the need to adopt regulations under the Packers and Stockyards Act to deal with concerns about anticompetitive and inequitable treatment of farmers and ranchers who raise beef cattle.

INTRODUCTION AND OVERVIEW

I appreciate the opportunity to testify at this hearing. I understand that the overall concern motivating this hearing is the state of competition in the agricultural industries and that there is a particular interest in the implications of the continuing patterns of consolidation in the industries that both consume agricultural products and those that supply agricultural markets. Two proposed pieces of legislation, S. 2252 and S. 2411, are also relevant to this hearing. Each would increase the legal authority of the Secretary of Agriculture to challenge some mergers that threaten to cause undesirable consequences for America's farming communities as well as expand the Secretary's authority to deal with unfair or anticompetitive acts and practices in the markets for agricultural products.

At the outset, it is important to acknowledge the wide range of significant competitive issues that confront farmers and ranchers today. From dairy to grain to meat, farmers face increasingly concentrated markets into which they are attempting to sell. Moreover, increased concentration at more remote parts of the distribution chain—food processing and retailing—contribute further problems. The result is a seriously adverse effect on both farmers as suppliers and consumers as the ultimate buyers. The adverse effects of increased concentration are made worse for farmers and ranchers because of the increased use of contracting of various kinds which on the one hand provides better pay but on the other hand presents serious risk of arbitrary and unreasonable conduct for those subject to such contracts and inequitable access to the benefits that such agreements can and sometimes do provide. These equity considerations fall outside the usual scope of conventional antitrust, but are clearly contemplated by the special powers given to the Secretary of Agriculture under the Packers and Stockyards Act (PSA) but, regrettably, were not included in the Capper-Volstead Act.

Another major area of concern for America's farmers and ranchers arises from the changes that are occurring in the industries that supply them with such essential goods and services as seed, herbicides and pesticides, farm equipment and rail transportation. Here too increased concentration exacerbated, especially in the biotechnology area, by exploitative and exclusionary use of contractual arrangements sometimes based on intellectual property rights is imposing serious, negative effects.

The solution to these problems requires modernization and expansion of the authority of the Department of Agriculture to provide appropriate protection for farmers against the strategic conduct of large, market dominating firms. These are basically concerns about undue discrimination and denial of equitable access to markets. There is also a need for rethinking the scope and meaning of the antitrust law as it applies to questions of buyer power. Finally and equally or more important is the need for both the will and resources to enforce the existing law with resolve. Because the Senate Agriculture and Judiciary Committees have expressed interest in

---

[1] Carstensen, "Concentration and the Destruction of Competition in Agricultural Markets: The Case for Change in Public Policy," 2000 Wis. L. Rev. 531.

[2] Carstensen, "The Content of the Hollow Core of Antitrust: The Chicago Board of Trade Case and the Meaning of the 'Rule of Reason' in Restraint of Trade Analysis," 15 Research in Law and Economics 1 (1992).

[3] E.g., Carstensen & Dahlson, "Vertical Restraints in Beer Distribution: A Study of the Business and Legal Justifications for Restricting Competition," 1986 Wisconsin Law Review 1; Carstensen, "Legal and Economic Analysis of Vertical Restraints: A Search for Reality or Myth Making," in Issues After A Century of Federal Competition Policy, Wills, Culbertson, Caswell, ed., 95 (1987).

these issues, the Department of Justice Antitrust Division has greatly increased its attention to agricultural markets in the last two years. The FTC has also taken a tougher stand on grocery chain mergers. A competitive structure in the retail grocery market is also essential to maintaining the overall competitiveness of American agriculture. Similarly, but belatedly, the Secretary of Agriculture is contemplating adopting rules that would provide better protection for equity concerns in the cattle industry. However, as the GAO has recently reported, the Grain Inspection and Packers and Stockyards Administration (GIPSA) which is the primary enforcement agency within the Department of Agriculture (DOA) has still not mastered the skills necessary for effective enforcement of the existing law. The GAO recommends improvements in training of the staff of GIPSA and acknowledges that need for increased resources to make it an effective enforcement agency.

The following sections of this statement will elaborate, briefly, on these inter-related issues. First, I want to highlight some of the current concentration and restraint problems confronting America's farmers and ranchers. Second, I will review briefly a few important competition policy issues including the important distinction between equity concerns and conventional competitive analysis. Third, I will comment on the two bills proposed in the Senate to identify what I regard as their strengths and limitations. Lastly, I want to review briefly the necessary components for effective enforcement of the laws already on the books as well as the proposed changes.

I. Issues of concentration and competition in agricultural industries

It is increasingly apparent that the effects of concentration are harming both agricultural producers and consumers. The following is not a systematic or comprehensive review but is rather a brief survey based on what I have learned in the last few months. In fairness, there are a few examples of pro-active enforcement that has kept matters from getting worse and I will acknowledge those that I know about.

A. Dairy

On August 15, the Wall Street Journal reported that consumers in Chicago were paying $1 more per gallon for milk in Chicago compared to Milwaukee even though both cities are getting milk from the same upper Midwest farms. Moreover, the price of milk in Chicago continued to rise despite a 26% decline in farm prices. The difference between the two cities is that ⅔ of Chicago groceries are sold by two large chains.

The same Wall Street Journal article reports that in New England retail prices did not decline when the price of milk declined. As a result, New England consumers are paying at least 10 cents a gallon beyond the extra charges imposed by the New England Dairy Compact. I have seen data on milk prices for New England that show that milk prices to stores jumped by a substantial amount immediately after Suiza, already the largest processor in the region, acquired one of the remaining independent milk processing plants in the region. This increase in the wholesale price of milk was unrelated to any change in the price paid to farmers for fluid milk. In addition, dairy farmers in New England are increasingly restricted in their outlets for milk because of the relationship between the Dairy Federation of America (DFA), a dairy cooperative, and Suiza in which DFA owns a substantial minority interest and with which it has a milk supply contract. Allocation of the opportunity to provide fluid milk is important to dairy farms. Serious access and equity issues are developing as the concentration of control over access to fluid milk sales increases. These issues are already serious problem in the livestock and poultry sector.

The trend toward consolidation extends beyond the processing of fluid milk. Land O' Lakes, the second largest daily cooperative in the country, recently acquired control of Madison Dairy Produce which manufactures 15% of the butter produced in the United States. The Antitrust Division did challenge a subsequent merger in the butter field (U.S. v. Dairy Farmers of America, C.A. No. 00–1663, E.D. Pa.) but has settled the case by allowing the acquisition subject to some restrictions limiting the ability of DFA to rely on the Capper-Volstead immunity. After this merger, Land O' Lakes and DFA will control 90% of the branded butter sales in key eastern markets. The pattern of consolidation in dairy is rapidly eliminating choices for farmers to market their milk.

B. Livestock

Studies show that the slaughter industry is highly concentrated and that concentration is substantially greater than it was in 1980. A significant factor in this structural change was a series of mergers that took place fifteen to twenty years ago. The data from the most recent studies on margins shows that the margin re-

tained by the slaughter houses has increased substantially. This suggests that the slaughter houses are exploiting more vigorously their monopsonistic or oligopsonistic power to depress farm prices relative to the prices they are getting from the grocery stores.

Some commentators have argued that high concentration is helpful because of putative efficiency gains. The fact is that high concentration is not related to efficiency. The optimal plants for hog or beef processing require only 2 to 4% of the total national volume. If there were some further efficiency from multi-plant operation, something which even industry representatives declined to claim last week in Denver, the market could easily sustain 7 to 10 separate processors in both pork and beef and each could have 2 or 3 plants. This in turn would create a much more competitive buying structure for cattle and hogs.

Other studies show substantial differences in the prices paid for like grade and quality livestock favoring the farmers, feedlot operators and ranchers who have received long run supply contracts (captive supply) in comparison to those operators who sell in the spot market. These results are consistent across a large number of studies done for GIPSA. Moreover, because a substantial percentage of beef sales are done under captive conditions, those cattle are withdrawn from the spot market. This results in an increasingly thinness of the spot market which is then more vulnerable to manipulation. The spot market directly and indirectly influences livestock future prices, the price for calves and feeder stock, as well as the price for captive sales. As the public market signals become more unreliable, this makes it more and more difficult for farmers and ranchers to operate their businesses effectively.

A further problem is that only chosen operators are given access to captive supply contracts. This imposes negative price differentials on many of the small and middle sized cattle producers in the country. Even if the average price for cattle combining captive and spot market is reasonable, this systematic differentiation among sellers creates serious equity problems and threatens the viability of our traditional farming system.

The same problems only worse exist in hogs. In poultry there is no longer a spot or public market for general production. All supplies are captive under contracts that impose a wide variety of unfair conditions on the growers.

C. Grain

On June 30, Judge Kessler approved the Department of Justice settlement in the Continental Grain-Cargill merger without so far as I have been able to learn writing an opinion justifying her approval. This is distressing given the very large number of comments submitted to the court objecting to the settlement in the case. The decision to approve this settlement is, on its merits, most unfortunate. That settlement shows the narrow, present market effect orientation of the Antitrust Division. Continental's outlets in specific, narrowly defined product and geographic markets were targeted for divestiture. Yet given the number and range of the divestitures required by this approach it should have been obvious that the merger has and will have broad impact on competition in grain markets through out the country. Essentially, Cargill is being allowed to slice and dice a major competitor. The divestiture will largely add assets to another of the remaining large firms. It will neither restore nor enhance competition in the grain trade generally.

If no state acts to sue this merger, the upshot will be increased concentration of the global grain export business which in turn will increase the potential for oligopsonistic conduct by the major grain buyers. Already the grain business like the meat business is highly concentrated at the buying level on a regional basis.

D. Grocery retailing

Nationally, the largest grocers have an increasing and large share of all sales. Currently, the top five chains control 40% of sales. This creates power to exploit consumers as well as buying power that can distort the market processes supplying grocery stores—all the way back to the farm. This dramatic increase in national and regional concentration is a direct consequence of the merger mania that has afflicted this industry. Size confers bargaining power even though it does not produce any meaningful efficiency gain. This power allows the large grocery to drive down the price of the products its buys without necessarily reducing the price to the consumer. The problem of slotting allowances is another example of how retail grocery chains use their buying power to distort competition and foreclose small firms from the market. The intermediate layers of processors are powerful enough not to be forced to absorb these price cuts or pay the slotting fees. Thus, price cuts and fees in the form of still lower prices are passed back to the farmer and rancher who originally produced the crops and livestock. Such buying power ultimately results in further reductions of farm income because the farmers and ranchers of America

are so atomistic in structure that they can not resist effectively the reduction in price that will be inflicted on them.

The excessive increase in concentration in the grocer industry is the consequence of failure of the FTC to police grocery mergers as rigorously as it should have. In particular it did not appreciate the buying side importance of national concentration data. It is therefore encouraging that recently the FTC has shown more willingness to resist further combinations. It has rejected the Ahold effort to acquire Pathmark in the northeast and the attempt by Kroger to buy 75 Winn-Dixie stores in Texas and Oklahoma. It is imperative that the agency continue to adhere to its new tougher position.

E. Food processing

Food processors have responded to the growth of concentration in grocery retailing with mergers among themselves. The common explanation is the "need" to be larger, not to achieve productive efficiency, but to have the size to bargain effectively with the grocery chains. The pending merger of Kraft and Nabisco is illustrative. Arguably this merger does not eliminate substantial direct competition in grocery products, but it will further reduce the alternative buyers for grain products thus creating further increases in processor buying power. Current reports are that the federal authorities are unlikely to object because the long run harm to competition by such buying concentration is not seen as a serious problem outside of a few special cases.

F. Supply-side issues—railroads and farm equipment

The number of major producers of farm equipment has been reduced dramatically over the last few years. The choices open to farmers and ranchers are greatly reduced. Local equipment retailers have been forced out of business.

The massive consolidation of America's railroads has created a further burden on agriculture. The closing of branch lines and the combining of main lines has greatly reduced the options for shipment for rural America. Agriculture is a major rail user and so the loss of competition has had particularly negative impact. This takes the form of both higher prices and poor service. Indeed, the latter is perhaps more of a problem than the former. The near monopoly rail systems do not have to take the needs of farmers and those marketing the local crop seriously because these are truly captive customers.

G. Biotechnology—seeds, herbicides and pesticides

Perhaps the most troubling area on the supply side is in the rapidly changing biotechnology field which is central to the new generations of seeds, herbicides and pesticides. The first observation is that there has been a dramatic rush of mergers among firms engaged in these activities. By one recent count, the major biotech firms have engaged in 68 mergers in the last few years. The result is rapidly increasing concentration in these biotech fields. Among the anticompetive results—Monsanto which controls the most herbicide tolerant soybean, was allowed to acquire the firm that controls the best sources of seed germ necessary to developing improved soybeans. Thus, Monsanto now controls the access of its competitors, including the two competing herbicide resistant soybean types, to one of the most essential elements in effective competition.

Of equal concern are the use of exploitative contract terms and systems of rewarding dealers that seek to foreclose future competition and extract all economic gain from the farmer. Worse, the same terms are not imposed on buyers in other countries thus putting American farms at a greater disadvantage in global competition. Monsanto, for example, uses contracts based on its patent rights to foreclose farmers from replanting the soybeans that they have raised. Thus, to continue to use Monsanto's seeds a farmer must continue to pay a substantial fee for every bag of seed planted. In other countries, I am told, Monsanto does not impose comparable restrictions. Thus, it denies American farmers the opportunity to compete on equal terms with the rest of the world.

I should note that in recent months the Antitrust Division has blocked at least one combination in the high tech field. Monsanto abandoned its effort to acquire Delta & Pine Land. If that acquisition had gone forward, Monsanto would have controlled a monopoly share of the cotton seed business in addition to its domination of soybean seeds.

The continuing theme of this brief survey is that consolidation and concentration are rampant on both sides of the family farmer. The results are higher prices to consumers and lower prices and more limited access to the market for farmers and ranchers. Only in the last year or so under pressure from Congress have federal law enforcers begun to take a stricter view of this transformation.

II. Legal policy issues in agricultural competition

In going forward to achieve better oversight and policing of the markets in which farmers buy and sell, there are several legal policy issues. Law enforcers need to be more concerned with the dangers of buying power. There is a need for stricter enforcement of merger law both in initiating cases and defining appropriate remedy. Further, given the existing structure of the markets supplying and buying from the farmer, antitrust enforcers need to be much more attentive to the competitive risks created by strategic alliances and tacit understandings among market dominating firms. In addition, it is important to appreciate the different concerns of regulation focused on competition alone and regulation concerned with fairness and equity among market participants. Both topics are sources of major concern in agriculture. Lastly, it is important to review critically the scope and operation of our intellectual property law because of the undue and unfair burdens that too frequently result in contemporary contexts.

A. Buying power must be recognized as a major competitive concern in merger analysis

Traditionally the primary, indeed sometimes exclusive, concern of antitrust analysis was on the effect of merger on consumers. The impact on suppliers was largely ignored. Substantively, antitrust law has been clear that the risk of adverse impact on suppliers is as much a concern as impact on customers.[4] Because the enforcement agencies ignored this principle, they failed to object to the combination of major meat packers in the 1980s that was the root cause of today's excessive concentration in beef packing.

The study of buying power and its competitive implications is still underdeveloped. Recent congressional hearings have focused on the problem of slotting allowances which are a manifestation of the power of retailers to block access to the market. As the level of concentration increases in grocery retailing the buying power of the remaining chains will increase to the detriment of customers who will loose choices and face higher prices as well as upstream producers including both processors and farmers who will get lower returns for their products and face greater costs in bringing new products to the market.

In deciding to pursue the Cargill-Continental merger, the Antitrust Division has explicitly acknowledged that it will now consider buying power as an important concern in antitrust.

Very recently, the Seventh Circuit Court of Appeals, following up on this theme, upheld the Federal Trade Commission's challenge to Toys R Us (TRU), a major toy retailer, efforts to restrict its suppliers' sale of toys to TRU's competitors.[5] TRU is the largest retailer of toys in the country—selling about 20%. It induced its major suppliers to refuse to provide comparable toys to its lowest price competitors in order to protect its profit margins. There is a somewhat similar case in the European Union involving retailer buying power.[6] These cases re-emphasize the dangers of buying power to the overall competitive operation of the market. They also show that lower market shares may create serious competitive issues than are normally seen on the selling side.

The current antitrust merger guidelines, however, pay no more than lip service to the problem of buying power. As the recent cases suggest, the standard for concern about buying power is and should be different (lower) than the threshold that creates concern for seller power. Effective client counseling and enforcement of the merger law require the FTC and Antitrust Division to clarify and elaborate the standards to be used in reviewing transactions that raise these issues.

B. Stricter enforcement of merger law in initiating and resolving cases is essential

Law on the books does not translate into effective implementation without a commitment to vigorous enforcement. While the current leadership of both the FTC and the Antitrust Division have been substantially better than their immediate predecessors in enforcement generally and in merger enforcement in particular, much

---

[4] Mandeville Island Farms v. American Crystal Sugar Co., 334 U.S. 219 (1948). In another important decision the Court recognized that a refusal to deal with a supplier based on an understanding with another supplier can constitute an unreasonable restraint of trade. The lesson once again is that upstream vertical agreements can also result in serious harm to the competitive viability of the market system. NYNEX v. Discon, 525 U.S. 128 (1998).

[5] Toys R Us v. FTC,—F3rd—(7th Cir., Aug. 1, 2000).

[6] Kesko/Tuko, Case T–134197, European Commission; see, Curtin, Goldberg, Savrin, "The EC's Rejection of the Kesko/Tuko Merger: Leading the Way to the Application of a "Gatekeeper" Analysis of Retailer Market Power Under U.S. Antitrust Law," 40 Boston College L. Rev. 537 (1999).

more needs to be done. It is manifest that consolidation in the markets serving and buying from farmers and ranchers along with grocery store and food processor markets were not given substantial and sustained attention for too long. Even now there is too great a tendency to ignore the implications, especially on the buying side, of these combinations and to settle for partial divestitures which do not fully restore the competitive conditions of the market.

This is particularly important to agriculture because the consolidation of customers or suppliers imposes a number of burdens on farmers that are not fully recognized by conventional antitrust thinking. For atomistic competition to retain its vitality at the farm and ranch level, it is essential to have a number of potential customers and suppliers. Only then do the market forces tend to create the conditions of openness, full disclosure of information, and equal access that are essential to the survival and prosperity of individual farmers and ranchers. In deciding which cases to pursue and in deciding how to settle cases, antitrust enforcement officials have ignored or downplayed the impact of their actions on the broader agricultural community. The perspective arises from either a belief that such impacts are alien to competition policy or a failure to appreciate the long run significance of such market transformations

The sweeping consolidation of these markets if not policed effectively will ultimately doom. American agriculture to some form of vertical integration that creates a kind of economic serfdom for those who remain in farming. The model exists in the poultry business and is growing in pork and beef. Soon it may govern all commercial agriculture.

C. Greater focus on the anticompetitive effects of vertical contracts, strategic alliances and tacit understandings

The massive consolidation in agricultural markets in turn is making possible new types of anticompetitive agreements as well as creating more competitive risk from long employed types of agreements. Restrictive agreement can achieve both protection and entrenchment of the position in the market of a dominant firm. To that extent, they produce no gains for consumers or farmers and ranchers. Indeed, this conduct is likely to harm the long run best interests of both classes. At the same time, contracts and other agreements can and do have legitimate business purposes and can not be condemned categorically. Several types of conduct problems seem evident:

Strategic alliances: Non-merger collaborations among large firms allow them to coordinate their competition in order to create mutual power. The intended effect is to obtain a stronger market position. A few of these alliances might provide economically useful coordination if they create an efficiency enhancing joint venture to produce or distribute new products. Such joint ventures also show that merger is not an essential element to effective entry into new lines of business. Other alliances, to the extent that we have any reliable information, are merely a mechanism to coordinate efforts among firms to limit their direct competition and ensure mutual strategies to build market power. As we increasingly see the same firms in a variety of buying or supplying markets and sometimes in both kinds of markets and frequently with very large positions, the risks of cooperative suppression of competition by express or tacit understanding becomes greater. Strategic alliances are a vehicle by which such firms can communicate their respective interests so that they better accommodate each other without having to engage in direct competition.

It should be a source of real concern that we know so little about the scope and content of these alliances. The parties, except as required by law, do not make public disclosure of their agreements or how they are implementing them. Given the high levels of concentration both within markets and industry sectors as well as the growing vertical integration in these industries, such disclosure is essential to proper evaluation of these relationships.

Furthermore, antitrust authorities have been notably absent from any sustained inquiry into these arrangements. This is an area in which focused investigation would seem essential. But to date, it has not occurred.

Vertical contracts: The growth of contracts between processors and producers in a variety of agricultural commodities has produced an additional set of harms. These contracts have arguable utility by providing the producer with greater assurance of sale at a known price and by assuring the buyer that particular products will be available when desired. However, these contracts often have substantial non-efficiency motivation. In particular, if a producer can tie up a substantial segment of the existing supply under contract, it will be much more difficult for a new entrant to open up in the area because of the limited available supply. If a substantial segment of supply is controlled, it will destroy a workable transactional market; thus forcing the remaining producers to scramble to seek similar contracts. In the

end, such rivalry can destroy the more efficient and flexible means of linking producers to processors. The choices are not efficiency driven but the consequence of the rivalry that occurs in concentrated markets. One of the most difficult problems facing commercial agriculture today is that of gathering and interpreting pricing and other contract information.

Contracting is not inherently evil, but it can be used for a variety of strategic purposes if it does not take place in a well structured legal environment in which there is reasonable equality of bargaining power, limited incentive to engage in strategic behavior, and continuing transparency with respect to transactions. None of these elements are currently present in most agricultural dealings. I would note, however, that in Wisconsin, the state department of agriculture has adopted administrative rules governing the contracting for vegetables for processing. Those rules were the result of a series of sessions involving producers and processors as well as some individuals like myself. The result is a set of rules that govern the contracting process in ways that increase the fairness and equity of the resulting contracts for both parties.

In two decisions in the course of the 1990s the Supreme Court has reiterated its recognition of the risks to competition and economic welfare arising from vertical restraints.[7] These cases involved distribution restraints and the Court's concern was with the power created in retailers by exclusive territories and similar restrictions on intra-brand competition to over charge their customers. Nonetheless, these decisions recognize the broader truth that vertical restrictions of every kind, however laudable their initial intent, can have adverse competitive effects. In another important decision the Court recognized that a refusal to deal with a supplier based on an understanding with another supplier can constitute an unreasonable restraint of trade.[8] The lesson once again is that upstream vertical agreements can also result in serious harm to the competitive viability of the market system.

Slotting and other special deals at retail: Recent congressional hearings have focused on the emergency of slotting payments as yet another device that creates problems throughout the agricultural marketing system. Large food processors pay large retail chains for the privilege of having their products displayed favorably. Such transactions occur because there are large producers with multiple lines of goods dealing with very large retail chains. Buying a favorable location in a single store for a single product of small firm does not produce either foreclosure or likely gain. In such a situation, the store owner will decide based on his or her own judgment what to place on the shelf and the producer will compete on price and quality. When a large producer can deal with a handful of chains so that it gets a favored position, this enriches the chain and protects the large producer from the threat of competition that arises from consumer choice. Again, this problem exists because of the concentrated markets in retailing and production.

In sum, the present structure and conduct of the markets supplying agriculture and buying its products impose substantial but avoidable costs on farmers and ranchers as well as consumers. Moreover, the gain in terms of innovation or efficiency are not uniquely associated with the present system. Indeed, it seems likely that the country would gain on both counts from a different system that reduced concentration and opened up alternative routes.

It is essential that the antitrust enforcement agencies take seriously these issues and undertake not only to study them but to act to preserve as much competitive viability in our agricultural markets as is possible.

D. Competition and fairness in the market

Antitrust law is concerned with competition and not competitors as the Supreme Court observed in the Brown Shoe decision.[9] Thus, basic antitrust law does not concern itself with harms to individual firms. Economic loss is a part of the market and the role of antitrust is to protect the overall competitive process and ensure a competitive structure to markets. Only when the injury to a competitor is also an injury to competition does the conduct violate antitrust law.

The PSA in contrast has a clear point of view—it instructs the Secretary to regulate the conduct of packers and stockyards to protect producers and buyers from unfair and discriminatory conduct. PSA 202(a) and 202(e) are clear that equity concerns in addition to overall competitive analysis are relevant to evaluating such conduct. Moreover, the PSA recognizes that harmful results can be either intended or the consequences of the decisions made by packers. Thus, that the packer did not

---

[7] Atlantic Richfield Co. v. USA Petroleum, 495 U.S. 328 (1990); State Oil v. Khan, 522 U.S. 53 (1997).

[8] NYNEX v. Discon, 525 U.S. 128 (1998).

[9] Brown Shoe v. United States, 370 US 294, 320 (1962).

intend to discriminate or be "unfair" and indeed did not gain by its conduct is no defense. If the effect of particular market conduct is to discriminate, then there is a violation. This aspect of the PSA necessarily includes a concern for the equitable distribution of wealth as between the various participants in the process of production. This is an important theme in public regulation of market activity.[10]

The PSA does not confer price regulatory power on the Secretary. Rather the role is a more limited one of ensuring equal and fair treatment of those who supply and buy from meat packers. Legal regulation is essential to the creditability of any public market because of the incentives of powerful firms engaged in the market to exploit their strategic advantage to the detriment of the public users of the market. Federal securities law which strictly regulates the operation of our public capital markets is a good example of this strategy. American investor protection laws are so valuable that foreign corporations voluntarily list on our stock exchanges so that their shareholders will get the benefit of American securities law including full disclosure of corporate information. This strategy in turn permits easier and cheaper access to the public capital market because investors have the protections of a strong regulatory system ensuring equitable treatment.

Competition and fairness tend to yield similar results. In the case of regulating concentrated markets, however, there is some tension. To induce competitive efforts among existing dominant firms, it is sometimes the case that concealing information and creating opaque market situations will induce such firms to behave in a more competitive way. Conversely, creating greater price transparency is likely to facilitate tacit coordination among dominate firms provided substantial barriers to entry remain. On the other hand, reducing the capacity of dominant firms to engage in opportunistic, strategic, behavior with respect to key inputs through regulating the manner in which the market for inputs operates provides the kind of assurance that new entrants or marginal firms seeking to expand need to encourage more active competition on the merits.

I reference these tensions to underscore the complexity of the choices that must be made and necessity that there be a reasonable comprehension of the dynamics of the specific markets including the potential for effective entry and expansion.

Because antitrust law is concerned with competition and not the individual interest of traders in equitable treatment, Congress and the states have created a number of specific statutory systems to protect the less powerful parties in their relationships with powerful customers or suppliers. At the national level there is specific legislation to protect the interests of automobile dealers,[11] gas station operators,[12] as well as investors in the stock market.[13] State law provides protection for independent dealers serving major enterprises.[14] The central theme of all of these regulations is the need to ensure equitable treatment of all those who participate in an economic process. Because there are substantial disparities in economic size and power in a wide range of markets, government has necessarily had to play an important role in ensuring the equitable treatment of participants.

In agricultural markets in particular there is a long history, dating back to the earliest days of the English common law, of concern for the equitable treatment of producers and consumers. That history shows that there have been frequent abuses of temporary market dominance and unacceptable efforts to exploit informational or strategic advantage. Some of the remedies attempted in the past proved equally unattractive. Hence, the lesson is that there is a long standing and significant concern for the fairness and equity of markets in agricultural products. This concern is also evidence that over the long sweep of history there have been recurrent examples of strategic behavior causing serious social dislocation and requiring legislative or administrative intervention.

Modern regulation of market equity involves two general kinds of concerns both of which are manifest in the present problems facing American agriculture. One concern is for the integrity of the transactional market when it plays a central role in defining the price of transactions as well as equal treatment of participants in terms of access to favorable opportunities to buy or sell. This is most evident in the rules governing access to public securities markets in which all traders are to receive as equal treatment as possible. In addition, the law demands extensive and continuous

---

[10] See Calabarsi & Melamed, "Property Rules, Liability Rules and Inalienability: One View of the Cathedral," 85 Harv. L. Rev. 1089 (1972) (analysis of economic regulation stressing the role and effect of law in creating and assigning rights to wealth).

[11] Automobile Dealers Day in Court Act, 15 U.S.C. 1221 et seq.

[12] Petroleum Marketing Practices Act, as amended, 15 U.S.C. 2801 et seq.

[13] Securities and Exchange Act of 1934, as amended, 15 U.S.C. 78a et seq.

[14] See, e.g., Wisconsin Fair Dealership Law, Wisc. Stat. chap. 135.

disclosure of detailed business information so that investors and their advisors can make informed judgements.

A second recurring concern in the law is for equitable terms with respect to long term contractual arrangements. The petroleum marketing act, for example, gives the lessee of a gas station the right, under certain circumstances, to buy the station if the refiner proposes to sell it to a third party. The fundamental concept here is that the law must protect the interests of powerless actors in the market in the interest of both equity and efficient market operation.

The present situation with respect to captive supplies of beef cattle and their impact on the spot market as well as the implication of foreclosing substantial numbers of growers from access to longer term contracts illustrates the combined problem of equity and access. If foreclosing certain forms of transaction creates any real economic problems, then the question is how can any legitimate needs be satisfied in a way that is consistent with the fundamental goals of equal access and equitable treatment. A useful starting point might be the suggestions of Professor Stephen Koontz (Colorado State) to the Senate Agriculture Committee earlier this year concerning livestock markets. Professor Koontz suggested that the DOA needs to be much more pro-active in developing new grading standards and certification systems so that the transactional market could provide a place in which buyers could readily find the kind and quality of animal that they sought.[15] It is not enough he points out to be concerned with bad practices, the government must take the initiative to modernize the spot market and related market transactions to facilitate the desired transactions. This point applies generally. Government must take the initiative to facilitate workably competitive market contexts. Public markets do not happen on their own in equitable and fair ways. The strength of the economic interests at stake in the market will shape them to serve their own interests. The role of government is to restore the balance and facilitate the equitable development of the market.

Unfortunately the authority of the Secretary to police the fairness and equity of treatment in agricultural markets is limited. The PSA addresses only the business of meat packing. No comparable direct authority exists to police grain or dairy contracts. As market structure and conduct akin to that in livestock and poultry markets come to dominate other sectors, it will be increasingly important that the law authorize the Secretary to provide rules and regulations to ensure fairness in pricing and equal access to market opportunities for all farmers and ranchers.

E. The need for a critical review of the use of intellectual property rights to frustrate competition in agriculture

Increasingly, suppliers of seeds and other inputs to agriculture are trying to control the production and resale of the resulting crops and animals along with specifying the methods and products to be used in connection with raising these items. Here the problem is an expansive definition of the legal rights that patents and other intellectual property confer on their "owners." When a soybean developer wants to control the herbicide or pesticide used with the beans its customer plants, we see the kind of distortion that such rights create. We have new technology in plants and animals protected by legal systems developed in another time to define rights in different contexts. These rights confer vast opportunities to exploit the user. This is true across the board in areas of high technology. By licensing rather than selling the product, the owner can exercise comprehensive control over the scope and nature of the use made. In the concentrated markets of agriculture with the broad range of activities controlled by a single firm, these rights encourage a expansive and abusive exploitation of the user. Indeed, once one firm starts down this path, its rivals are forced to follow because otherwise they risk losing out in the race to survive. Thus, badly defined rights and concentrated markets induce the maximum in exploitation.

Too little attention has been paid to the ways in which these right are being exploited in the market. In my judgment it is imperative that public authorities concerned with fairness issues as well as competition policy begin to take a more active interest in the ways that those who possess such rights exploit them. This issue is one that extends well beyond agriculture, but farmers and ranchers are among the groups potentially most disadvantaged by such exclusionary and exploitive conduct.

III. The proposed legislation

There are substantial similarities between S. 2252 and S. 2411. Both would expand in important ways the scope of the Secretary of Agriculture's authority to deal

[15] See statement of Professor Koontz to the Senate Agriculture Committee at its hearing on April 27, 2000.

with problems of access and equity in agricultural product markets. Both would also give the Secretary the authority to challenge mergers that had adverse impact on farming and ranching even those impacts were not deemed to be the sort that violated the antitrust law limits on mergers. In addition, both would require better disclosure of strategic alliances in at least some segments of the industries related to agriculture and would outlaw the pernicious practice of some buyers of requiring that their contracts with producers be kept confidential.

On the other hand, both bills suffer from a regrettable limitation of focus. They both deal only with the sale of farm commodities and ignore the competitive issues raised by consolidation on the other side of the market where farmers and ranchers buy the supplies they require. Further neither bill authorizes the Secretary to look beyond the first market level and challenge consolidations in more remote processing or grocery retailing markets despite the obvious connection of such combinations to the long run well being of the agricultural community.

The future growth and prosperity of American agriculture requires that legislation of this sort be enacted promptly.[16] The Secretary of Agriculture has the responsibility today to advance the best interests of American agriculture. However, the Secretary lacks the legal tools to carry out this mandate in the context of the current market situation. Legislation is, therefore, necessary.

In the merger area, the fundamental idea would be to authorize a review of proposed mergers explicitly based on their likely impact on farmers and ranchers. When a merger or an element of it had or was likely to have an adverse impact, that would be a basis to deny the merger or require that it be revised to avoid the problem. The basis for determining this impact is not easily articulated. S. 2411 would test a merger by whether it would "be significantly detrimental to the present or future viability of family farms or ranches or rural communities * * *" [sec. 5(d)(1)(A)] while the standard in S. 2252 is "whether the proposed transaction would cause substantial harm to the ability of independent producers and family farmers to compete in the marketplace * * *" [Sec. 4(b)(1)]. My expectation is that over time guidelines or regulations would articulate with some precision the factors that would be relevant to determining the result. In addition, there is a significant question of how to balance a claim of economic efficiency resulting from a merger against the potential harm to farmers. In the area of banking, a similar test exists to justify anticompetitive mergers. There, the historical record suggests that no anticompetitive merger has ever been justified by the potential gains to other goals.[17] in the case of agriculture, given that there are almost always other ways to accomplish legitimate efficiency enhancing objectives, I would anticipate that a finding of likely adverse effect on farmers and ranchers, if sustained on the record, would almost always outweigh any purported efficiency claim. Since most cases in which such adverse effects will be found are likely to involve at least some conventional antitrust problems as well, the most likely effect of adopting this legislation is to give the Secretary a seat at the table in negotiating settlements so that they will better serve the interests of farmers and ranchers. The clear focus of this standard is to expand consideration of the potentially adverse effects of consolidation to take account of what I have been calling the access and equity concerns that exist in many market contexts especially ones in which there are vast disparities of size between buyers and sellers.

Second, both bills would expand the prohibitions in the PSA against unfair and inequitable treatment of agricultural producers that currently only apply to livestock to all agricultural commodity transactions. There is no justification for protecting only certain lines of agricultural production in today's market. I note that S. 2411 has somewhat stricter standards. It has an explicit requirement of plain language in contracts, more record keeping, explicit prohibition of retaliation, and a ban on differential pricing except when certain conditions are satisfied. My own preference is for such more express guidance to the Secretary in making rules and enforcing the law. I also realize that those more specific requirements can be readily inferred from the more general standards that are common to both proposals.

There is one important difference between the coverage of the proposals with respect to buyers or dealers in agricultural commodities. S. 2252 would completely exempt cooperatives from any of the duties of fair and equitable dealing. S. 2411 would exempt only small cooperatives. As to all large cooperatives under S. 2411, they would be subject to the same requirements of fair dealing and equal treatment that all other large buyers face. This is an important and necessary expansion of the authority to oversee market conduct. With the growing concentration of control

[16] I should note for the record that staff members working for Senators Daschle and Leahy consulted with me in the course of preparation of S. 2411.

[17] United States v. Third National Bank in Nashville, 390 U.S. 171 (1968).

over many product lines, especially in the dairy field, it is increasingly important that the decisions of powerful cooperatives that have differential impact on their members be subject to review. This is necessary because of the overall consolidation of these markets that increasingly make it difficult or impossible for producers to move to another buyer and get comparable terms. When such exit is not possible, it is important that there be a route to effective review of such economically significant actions.

All contracting takes place within the framework that the law allows. The central question is the structure of the legal system that defines the options available to the parties. In the context of agriculture, the growth in concentration on the buyers' side and their new strategic interests has not been offset by increased capacity on the part of individual farmers to respond effectively to the new context. Only government regulation can preserve a workable market context. It can do so by defining the kinds of information and terms that are permissible and insisting on public disclosure of important information to ensure that both sides of these transactions have reasonable access to knowledge. A recent decision in a federal court of appeals further supports the need to revisit the framework of regulation to ensure that it provides an appropriate context for both transaction and contracting.[18]

An important element to the successful implementation of these bills is the authorization for and use of rule making by the DOA. Rules can provide safe harbors for transactions and make specific the conduct that is not going to be tolerated. Both producers and buyers will, in the long run, welcome the development of consistent rules that provide a framework for on-going market relationships. S. 2411 explicitly authorizes rule making to implement its terms. I would expect that at least with respect to the prohibitions in sec. 5 of S. 2252 such rule making authority would be provided as well.

Unfortunately, both bills focus explicitly on the marketing side of agriculture. Thus, economically very important mergers for agriculture on the supply side are not included. It would have been preferable to have added a category of "related" businesses on the supply side of agriculture for which the Secretary had authority to conduct merger review. Further, there is no authority for the Secretary to review mergers further downstream—for example in the grocery retailing sector of the market. The limit of the proposed authority, while consistent with the scope of existing authority, would mean that the Secretary would be powerless to protect farmers and ranchers against adverse consequences of a number of potentially important mergers.

The proposed legislation authorizing more substantive regulation, building as it does on the traditional authority of the Secretary, focuses on the marketing of agricultural products and does not address the equally worrisome supply side of the market. On the other hand, the important provision requiring plain language in S. 2411 would apply to "other agricultural related businesses" which might, one hopes, include the supply side. In addition, however, as discussed previously, it is important to review and evaluate the merits of the new contracts that seed producers and others are using to control choices of their customers and not just the language or disclosures. Such substantive restrictions may well prove as harmful to the autonomy of farmers and ranchers as the restrictions on the buying side. Neither bill would address that concern.

Beyond these regulatory responses, the proposals would require disclosure of strategic alliances among firms dealing with agriculture. This information is essential to the continued development of sound public policy. Regrettably, both bills would apply this only to the buying side of the market and would not require disclosure from the supply side. This omission will create a serious gap in the information that will be made available which may in turn distort policy responses. I strongly urge that the disclosure obligation be extended to all large firms dealing with agriculture whether on the selling or the buying side.

At a more fundamental level, it would be very desirable to reconsider the scope of rights conferred under patent and other intellectual property regimes. In the modern world of large enterprises acting in very strategic ways, such rights can create an infinite number of toll booths along the route of production. The impact will be to increase costs, fracture markets, deter innovation, and ultimately undermine the capacity of our economy to grow through the use of high technology. At the same time, an appropriate system for rewarding innovation is essential as an inducement to developing new products and technologies. The need for a better balance transcends agriculture and extends throughout the entire economy. It is a need that neither antitrust law nor the Secretary of Agriculture is well situated to address. I ref-

[18] IBP, Inc. v. Glickman, 187 F.3d 974 (8th Cir. 1999).

erence it here to emphasize the extent to which the issues affecting agriculture also affect the broader economy.

IV. Effective enforcement

The best statutory plan in the world is worthless if those charged with enforcing the law lack the will and resources to enforce it. The DOJ and FTC have both been slow to recognize the importance of the competitive issues raised by the rapid consolidation of the many levels of the food chain. Even now, they have not fully recognized the problems of buyer power nor have they moved aggressively to investigate the many restrictive arrangements that these concentrated markets have called forth. It is my impression that because of expressions of concern from Congress and the public, both agencies have increased their vigilance and are doing a better job. I would suggest that their performance could be further improved. This is largely a question of will—are the leaders of those agencies committed to a full and vigilant oversight of the area? This does implicate the use of resources since neither the FTC nor the Antitrust Division has excess resources. Effective antitrust enforcement is not cheap. I would hope that Congress would be willing to support these two agencies with increased funding given the overall range and enormous complexity of the competitive issues each must confront—not only in agriculture but across the broad range of business activity.

As to the DOA, having originally been supportive of legislation that would expand its power to address competitive as well as fairness and equity issues, I have since been concerned that the present Secretary has not exhibited the level of political will that is essential to the effective implementation of current as well as proposed authority. The fact that the Secretary authorized the hearing in Denver on livestock competition and equity issues is a positive sign. That he chose not to attend the session is however less encouraging. It remains to be seen whether the Secretary and the DOA have the will to address the demanding issues of competition and equity in agriculture.

Even if the DOA has the will, the recent GAO report on GIPSA highlights information that has bothered me as well. GIPSA lacks the staffing, especially litigation counsel, necessary to be effective. It is sad indeed that only five possible litigators are assigned, full or part-time, to deal with its needs. In my view this is an extremely inadequate level of support. Moreover, these attorneys are not actively involved in the selection and investigation of cases. They only become involved after GIPSA's non-lawyer staff has attempted to develop a case. This is terrible organization if the goal is to achieve effective law enforcement. It is my view that DOA should reorganize its efforts at enforcement to create appropriate teams of investigators, economists and litigators under appropriate supervision if it is to have any hope of effectively enforcing the present or future laws governing competition and equity in agricultural markets.

I would add that it is my view that if the Congress expands, as it should, the authority of the DOA to address issues of competition and equity in agriculture beyond the narrow confines of the PSA, it must also provide the resources necessary to make that new law creditable.

CONCLUSION

American agriculture is at a cross roads. The rapid changes in the structure and conduct of both its customers and its suppliers constitute a serious threat to the preservation of the family farm and ranch. The threat comes not from any inherent inefficiency in these producers, but rather it arises from the strategic conduct that large firms on both sides of the farm engage in. With better legislation that more fully protects the rights of farmers and ranchers to equitable and fair access to the market, with a real commitment by the government to protect those rights, and with adequate resources for government agencies to do that job, our traditional and highly valuable culture of family farms and ranchers can continue not only to survive but to prosper.

Senator DEWINE. Let me start with a couple of comments, one to I think something you said, Mr. Gibbs.

About a year ago, Senator Kohl and I sent a letter to Joel Klein encouraging him, as head of the Antitrust Division, to appoint a special counsel, a special agriculture counsel. They did that. And now it is my understanding that what we envision by this legislation would actually go higher than that or would go beyond that. But I just thought I would put that in the record.

Let me also state that I have publicly stated that I support the Interstate Meat Shipment bill that has also been referenced in this committee by the witnesses.

Professor Tweeten talked about what farmers' return really is. And I am not sure that we have enough time today to debate that issue, with all due respect, Professor.

Let me ask the other panelists, though, on the committee, even if those figures are true—well, maybe I will start with you, Professor. What relevance does that have to this debate or to this issue? And what we are looking at here is concentration, what impact it has on competition, what impact it has on farmers, what impact it ultimately has on consumers. The focus today, it seems to me, is more on concentration than anything else. And my question, I guess, to start with you, is what does the income have to do with this or the return on investment? Which is I think what you were talking about.

Mr. TWEETEN. I presume that one of the motivations for this examination is that farmers are not getting a fair return on their investment and that concentration in agribusiness is one of the causes of it.

I would like to add a little more evidence.

Senator DEWINE. Sure.

Mr. TWEETEN. Let us take 1998, again, the first of the Depression years. Farmers had the highest household income ever. It was only topped the next year, when their incomes went up another 6 percent.

Senator DEWINE. What percent of that, though, and again I do not want to get into the weeds on this today, but what percentage of that came from the Federal Government?

Mr. TWEETEN. It depends on the farm. If you are on a big farm——

Senator DEWINE. Oh, I understand that. But what——

Mr. TWEETEN [continuing]. The ones who are doing very well, only a small percent came from the Federal Government. If you are on a small farm, something like 10,000 percent came from the Federal Government. The reason is they were losing money at a massive rate in agriculture, and the payments made very little difference. So that number in itself is meaningless because it puts together too many things—the big farmers who get a small share of their income from the Government, the small farmers who get a big share.

Senator DEWINE. I get that. My only point, and I think we are way off-field here, a little bit off-field, at least, my only point is if you are looking at how the market operates, I am not sure you necessarily would count in what kind of income they received from the Federal Government; I mean, whether they should or should not is another issue. But I voted for the bill, so I was for them, but I am not sure that has anything to do with it.

Who else wants to take that issue? And I want to keep moving here because we are running late this afternoon. But, Mr. Boyle, anybody, go ahead.

Mr. BOYLE. Briefly, Mr. Chairman, I think the whole question of market share or concentration levels is relevant to the legislation that is before the committee today because there does exist a per-

ception, if I may state it simply, that big is bad, and that as the companies I represent in the beef and pork packing sector become more consolidated, producers suffer. There is a lot of economic analysis. I would cite Professor Wayne Purcell at Virginia Tech who has documented that returns to producers are indeed higher in a concentrated packing industry than they would have been otherwise.

Senator DEWINE. Excuse me. What about Mr. Swenson's comment—I think it was Mr. Swenson—about Smithfield? Is that good or bad for consumers—not for consumers—is it good or bad for farmers? He does not think it is very good. What do you think?

Mr. BOYLE. I do not think it is particularly bad for producers and certainly good for retailers and consumers. The rationale behind the Smithfield Foods model, which is not shared by competitors in the industry, at least by all of them, is that in order to compete with branded poultry products, which comprise a sizable percent of the protein market in the United States today, a pork company has to control the raw materials—its availability, its consistency—in order to put into the market a branded, consistent product. That vertical integration that Smithfield is following, from their point of view, makes sense to compete in the animal protein market today.

I would also just add one other thing——

Senator DEWINE. That is the theory that when the consumer goes in and buys it, they all have to look alike or uniformity is how you all refer to it.

Mr. BOYLE. I do not have a marketing background, but I understand it is a rather simple premise of marketing that before you can put a brand on a product, before you can identify a price point in the market and promote it to a certain niche of consumers, you have to ensure the consistency of the product day after day. And vertical integration, in view of Smithfield Foods, helps them accomplish that and gives them an ability to compete with Perdue Chicken, Tyson's Chicken, Stonybrook Turkey, vertically integrated competitors in the animal protein market.

Senator DEWINE. And how about the farmer, though?

Mr. BOYLE. Well, if you look at the breakdown of Smithfield Food returns in the last quarter, for example, the company made money overall, but the profit came from the production side, not from the processing side. Indeed, if you look back over the last 10 years in the United States, as pork slaughtering became more concentrated, the single most productive and profitable, the single most profitable sector of the agricultural economy was hog production. There was a terrible low 2 years ago, but overall, over the last 10 years, it was the single most profitable sector of American agriculture.

Senator DEWINE. Who wants to jump in here?

Mr. GIBBS. I have got to jump in.

Senator DEWINE. We are kind of informal here. Mr. Gibbs and then Mr. Swenson.

Mr. GIBBS. I have got to jump in a little bit. I think a little bit goes back to what Dr. Tweeten said, it depends on the conduct of the processor of what they are doing. And there should be enough scrutiny of stockyards and packers to make sure that they are being looked at. That is a big question, and that has been evident today.

On your comment, Mr. Boyle, about the hog business, I have got to just take a little exception there. In the last 10 years, we had 1990 was very profitable; 1998 was such a disaster that it just about wiped out the profitable years in the rest of the decade. And the packing industry did very well in 1998 and 1999, and Smithfield did very well, and they had quite a few acquisitions and moved right up. But it does cycle.

Senator DEWINE. Mr. Swenson.

Mr. SWENSON. Thank you, Mr. Chairman.

Two points: One is if the statistics include the revenue generated by the integrators in the 250,000 commercial operations, you can easily see why the 19 percent existed.

But second, it really points out the whole crux of what this hearing is about, Mr. Chairman, is that when you have that power concentrated in the hands of so few, you can shift that at a detriment to those that do not fit into that category. If the returns for those that are below $250,000 or whatever level you want to pick are the ones that are suffering the loss, it may be because they have a lack of access to the market, and the return from the market that those above may have. And it comes back to the issue of contracting and how open the information is within the contracting for those that are in that category.

So I think it really points to the crux of why we have to address the issues that are before us to have a more open and competitive market system.

A second thing, if I can—I am going to take exception to Mr. Boyle, also—is the technology, if it is available to producers, and processors want consistency, it can be provided. But make sure that the producers that apply the technology are appropriately compensated for the application of that technology and the nature of how they produce their commodity, be it meats or be it grains as well.

Senator DEWINE. Mr. Swenson, my eyesight is not that good. I had to bring over this chart. Tell me about this chart again.

Mr. SWENSON. That chart shows that four firms, and their control now of those sectors of be it slaughter or soybean crushing or of that sector of the processing. It shows that four firms, for example, have 81-percent control now of all of the beef slaughtered in this country of any beef that is slaughtered.

Senator DEWINE. Let me ask the panel, just so we make sure we agree on facts here, does anybody disagree with these facts, whatever their significance? Does anyone have a problem with these facts?

[No response.]

Senator DEWINE. Let me ask a second question: Where are we in an historic pattern today; in other words, have we ever seen anything like this before? Without talking about what it means, we will get to that in a minute, but would this have occurred at any other time in our long agricultural history of this country?

Professor, we will start with you.

Mr. TWEETEN. I think this is a good example because a number of years ago the hog industry was essentially as concentrated as it is today. But if you read a history of the hog packing industry, what you find is that it is an incredibly dynamic industry. And

those firms that so dominated the industry back about 1900, and, Senator, there was a time when Cincinnati was the biggest hog producer in the country——

Senator DEWINE. Porkhopolises.

Mr. TWEETEN. Porkhopolises. But those companies are all gone. There is a massive turnover of firms. You are never sure whether you are going to last. There is another important point that ought to be brought out here, and that is the cooperatives are very active in most of these areas. In fact, the cooperatives account for about a third of the marketing and about a third of the inputs to farmers in this country. Are we saying that they are part of this exploitation, also? If the other firms are exploiting farmers and taking advantage, the co-ops ought to go crazy. They ought to do very, very well. In fact, they are kind of struggling.

Mr. SWENSON. Thank you, Mr. Chairman, if I can respond. Yes, prior to the Clayton-Sherman Antitrust Act, we probably saw that level of concentration, and we brought then back a greater competition that existed. Because when you can go past even what the charts show in certain regions of the country, as my colleague from the Ohio Farm Bureau pointed out, some of the regions are even a higher level of concentration than what the chart may show.

Let me just say one thing about the reference made to cooperatives is that many times cooperatives have to rely on suppliers from the very concentration that has been emphasized here today for their supplies to provide to producers. And so their hands are tied as to how they can provide in providing the fertilizers, and herbicides and seeds to their producer members because of where they can access those supplies.

The same goes into the market sectors. We take a look at greater concentration in the market sector. They may be the collector of commodities produced. But as they look to where they are going to market the commodities that the farmers have marked through them, that market has become more concentrated. They have less market opportunities.

Senator DEWINE. A final stream for you.

Mr. SWENSON. Absolutely.

Senator DEWINE. What about the rest of you? You have seen concentration at this level before? We will go with Mr. Gibbs, and then we will go to Professor Carstensen.

Mr. GIBBS. I would like to say that you can go back probably 150 years. The trend has been there, and it is increasing. But we are concerned about, like I said in my testimony, contract laws, there are certain things we can do to make sure that price transparency is there, price discovery is there, market access is there. And when you get down to the four firms there like you have got up there, that is where you have got to make sure that the oversight is there and the markets.

Senator DEWINE. Professor.

Mr. CARSTENSEN. I was just going to reference, in the meat packing area, and I think this picks up a little of what Professor Tweeten had said, around 1920 there was a major antitrust case that attacked that industry because the concentration levels were at or above the present level. Those companies were put under a series of restrictions as to how they practiced their business. It is

also why we had the Packers and Stockyards Act adopted in 1921. Then the industries deconcentrated and then reconcentrated in the 1980's, largely because of a series of mergers that the Justice Department did not challenge. And that was where the reconcentration of that industry came from.

Senator DEWINE. From a classic antitrust analysis, though, is it not true that these facts, in and of themselves, do not necessarily mean we have a legal problem?

Mr. SWENSON. That is true, Mr. Chairman.

Senator DEWINE. We have to know how it is broken down, for example, within those four. And just knowing these facts on their face does not, in a classic antitrust, say that we have got a problem.

Mr. Swenson, do you agree with that?

Mr. SWENSON. I agree that I think those facts—but I think they point out what the ramifications can be. As Senator Daschle said in his testimony, some of this has occurred under the structure of legal. Is that why we need to review our current antitrust laws? Is that why we need to strengthen them, enhance the investigative powers? Absolutely.

Senator DEWINE. So basically what you are saying is that is why you need to have antitrust plus or why you need to go beyond. And your argument, Mr. Swenson, would be that agriculture is a different type industry, a different type business, that we need to do this for many reasons, to go beyond the traditional antitrust analysis.

Mr. SWENSON. Absolutely. And I think Senator Kohl pointed that out when he talked about what has happened in the telecommunications area.

Senator DEWINE. Professor Tweeten.

Mr. TWEETEN. The American farmer, if I may go back to my income numbers, has average household income about 15 percent——

Senator DEWINE. I am taking those numbers back next time I go for a meeting——

Mr. TWEETEN [continuing]. About 15 percent.

Senator DEWINE. I will bring you in and explain to my farmers why their——

Mr. TWEETEN. About 15-percent higher average per household than nonfarmers. Now, how did they do that? How did they accomplish it? I submit that one of the major ways they accomplished that was because of mechanization of agriculture. And that mechanization was the product of agribusiness and some pretty concentrated agribusiness. What percent of the market does John Deere have? It is pretty sizable.

I say what farmers really have to fear is the efficiency of agribusiness, not the predatory behavior of agribusiness.

Senator DEWINE. Mr. Boyle.

Mr. BOYLE. Mr. Chairman, I agree with the premise of your observation as you looked at that chart. Those concentration levels, in and of themselves, are not indications that there is anything wrong with this sector of our economy. In fact, those concentration levels can be replicated, are indeed replicated in many other sectors of our economy—automobile manufacturing, banking, airlines, just to name three of many sectors that have relatively high levels

of three- and four-firm concentration levels, concentrated market shares.

But there does seem to exist, at least within agriculture, a greater concern about these concentration levels in our sector of the economy, even though they are replicated in other sectors. And we do have, at least in the meat-packing sector, an added level of regulatory oversight that was referred to a moment ago with the creation of the Packers and Stockyards Act. And despite some of the OIG observations, that Agency has been more active in this decade than in recent decades in conducting investigations of the meat packing industry—three extremely thorough and extensive investigations between 1996 and 1998 in the cattle procurement and hog procurement. The conclusion of each of those was that it is a highly competitive industry with no evidence of any unfair trade practices.

We are in support of that added extra oversight that has existed for 70 years, but we are opposed to something beyond that, which both of these bills would provide to American agriculture.

Senator DEWINE. It seems to me—this is an observation, Mr. Boyle, and the rest of the members of the panel—that farmers historically have been very, very wary and concerned about concentration, more than anybody else, and I think the reason is that there are so many things that are beyond a farmer's control. They obviously cannot control the weather, they cannot control a lot of other things, and they cannot control the market price. I mean, they cannot really control it on a macro basis.

And they are always concerned, and there have been instances in U.S. history—I mean, you go back to what we learned in high school in American history, let alone any advance course, of where, because of the ability to get to the market, you are a captive shipper and you only had one place to ship it on a railroad, and you had to pay whatever that railroad told you they were going to charge you or your crop rotted, or you only had one stockyard to take it to, or one place to go. I mean, you might say farmers are extra nervous about this, but history teaches them that they have had every right to be nervous about this. And so I think when they look at this, that is why I hear it, and that is why anyone who travels in any farm State hears it.

Chuck Grassley is as in tune to farmers as anybody I know, and you heard what his testimony was. Now I have set off the alarm bells over with the professors.

Mr. CARSTENSEN. I think what you are pointing to again is the issue that I mentioned earlier, which is the difference between seller power and buying power. When you talked about a classic antitrust view, it is a CR–4 of 80 percent in terms of selling into a market, well it does not tell us a lot, and we know that there is a substantial potential for competition.

What we are seeing on the buying side in some of the cases that have been successfully prosecuted now is much lower buying power. Toys R Us only had 20 percent of the national toy market as buyer, and they were able to do substantial harm to their competitors in that toy retailing business. So part of it is that what farmers are looking at is buying power, not selling power, and that is why we really do need to think about this as an antitrust issue in a different kind of way from the conventional selling power prob-

lem. And that, fortunately, is now on the radar screen for both the FTC and the Department of Justice. They need to do a lot of work on working it out. Because, again, picking up on what Professor Tweeten said, it is going to be conduct issues. They are going to be characteristics of markets that will make buying power more significant or less significant. I think the atomistic farmer is much more likely to be the powerless victim than if you had fairly substantial firms on the other side of the buyer-seller relationship.

Senator DEWINE. Professor Tweeten.

Mr. TWEETEN. In 1630, the tobacco growers burned their tobacco sheds and rioted because they were unhappy with the price that the English merchants were paying for their tobacco. Since then, there has been the whiskey rebellion, there has been the Patrons of Husbandry, the Farmers' Holiday movement, the Farmers Alliance. It has been one revolt after another, one populist uprising after another.

The fundamental source of the farm problems are God—I am talking about nature—their——

Senator DEWINE. I am glad we clarified that. [Laughter.]

Mr. TWEETEN [continuing]. Their commodity and business cycles. There are a lot of uncertainties that I say are the number one problem of commercial agriculture instability, but there is always a tendency not to put the blame on these forces, but to put the blame on whoever is closest to you. So the tendency is to lay the blame on agribusiness. That blame has rarely been justified.

Senator DEWINE. Mr. Swenson.

Mr. SWENSON. Well, Mr. Chairman, if I may. Let me just say that we know in production agriculture we need agribusiness. We know we need that process. Let us just make sure we have a competitive process, we have an open process, so that we have a competitive market of which to procure product, as well as sell it. We believe that that is shrinking, and that does not provide then that real entrepreneurship, capitalist benefit, that free enterprise system.

Let me just go back to these income statistics that keep floating around here that try to distract from the real issue. What about off-farm income that has just skyrocketed now in the last number of decades, where more and more farmers have had to rely on off-farm income with which to sustain their farming operations? That comes into play in these statistics. The integrators, the way USDA calculates their farm income now, includes all the money derived through integrators, such as Smithfield Farms, such as Murphy Farms, and all of those statistics that go into those types of figures. So, in aggregate, they may sound good, but when it comes down to individual farmers and ranchers, let me just tell you, Senator, I am hearing from our people the same message you are hearing of the struggle that they have. And they look at what is happening in prices and then what is facing them in their procurement of products in their market.

Senator DEWINE. Mr. Swenson and Mr. Gibbs, you have heard I think from some of the other panelists who, if I could summarize, would say: Well, yeah, we understand these statistics, but so what? It really does not mean that we have got a problem out there, and you all have not shown us that there is a problem. You have shown

us that there might be a problem some day or that there is this and that. But you have not shown us any kind of problem.

Maybe from even an anecdotal point of view, what have these consolidations, this kind of concentration in the market, what specific problem does that create today for an American farmer, any American farmer? If you can give an example of someone having trouble with only one place to take their, you know, to market their commodity, whatever that might be.

Mr. Gibbs, we will start with you.

Mr. GIBBS. Well, I think it comes back down to, being a hog farmer, of market access and price discovery, we sold the plant in Detroit, and they went out of business, and now we are selling a plant out in Indiana which sold——

Senator DEWINE. Where do you go?

Mr. GIBBS. Indiana Packers out in Delphi, IN. There are a lot of producers out here that are trying to put structures in place to put hog numbers together, talk to packers and try to coordinate. And there is a lot of contracting going on, and you have seen in the last couple of years the contracting has really increased. And one of the problems is contracts can be good and contracts can be bad. And like I said in my testimony, one problem I see with some of the contracts are based on the spot-market price, and that is getting less and less, and it has become a salvage-type market.

So that we have got to get back to the transparency. I think if a packer, a Smithfield or whoever, if they are going the put out several options, and contracts, and talk to producers, and the producer can deliver those hogs at the quality they need and the quantity, and negotiate in a transparent way, and then, also, it would be nice if we could have a price-reporting system that came all the way down further up the value chain, the food chain, and reflected the true price of those hogs and work in a coordinated effort, that would be one way to help the concentration questions that come up, I think.

Senator DEWINE. Mr. Swenson.

Mr. SWENSON. Thank you, Mr. Chairman. There are absolute indications and situations where producers have had commodity which to market, and they have contacted their local elevator, and the elevator said we are not buying today. They have tried to contact another one and have not been able to market product.

Senator DEWINE. What caused that, though?

Mr. SWENSON. Because I think the consolidation, the fact that there is not the competition when you reduce that number of firms out there buying product of which to even move domestic market or international market. We have had situations when an elevator has tried to move grain that they have, because of being on a captive rail line, have had to pay above the book price in order to get the cars out there because the train did not want to deliver them, had better use and better return for the use of their cars. They had nowhere else to go of which to move product into the market system.

So there is absolute stories that show the impact of this consolidation. Because on a regional basis, it is even greater, it is even greater. And I am not picking on the meat industry, I am talking

about all sectors that this situation is beginning to impact producers.

Senator DEWINE. Good.

Mr. Boyle.

Mr. BOYLE. If I could have an opportunity for a few observations in response to my colleagues' comments.

Senator DEWINE. Sure.

Mr. BOYLE. I am familiar with a number of anecdotal examples of concerns that emanate from concentration in the meat-packing sector. But to the best of my knowledge, they are anecdotal. And I reach that conclusion by reviewing, for example, the GIPSA study of Kansas, looking at almost 9 months of cattle procurement amongst packers competing in that State. It is more than a representative sample, Mr. Chairman, because 25 percent of the cattle in America is slaughtered in Kansas. GIPSA studied every single procurement of cattle in that State during an 8- or 9-month period of time. And they found that, despite the anecdotal comments that there are days when feeders want to sell cattle and packers will not buy, they found, when they looked at the records, packers were buying cattle Monday through Friday, every day of every week of every month during that period of time. They also found that forward contracting, packer-owned cattle had no impact on pricing adverse to the producers.

Professor Carstensen made a comment about buying power. While there is concentration already in the meat packing and processing segment, I would predict that you will see continued concentration in response to the increasing buying power on the part of our customers in the food service segment/retail segment as they consolidate. Buying power does drive consolidation, and I think you will see more of that because our customers are consolidating.

And then one final observation about Mr. Gibbs' remarks about procurement contracts. He says some are good and some are bad, and I suppose that is true. Within the last 4 or 5 years, a significantly large percentage of hogs being sold today are being sold pursuant to contractual arrangements with packers. Both parties benefit from those arrangements. The packers' motivation to go into those arrangements in the mid-1990's was in the wake of record prices for hogs—over $60 a hundred weight. There was a period during that time, Mr. Chairman, where hogs per hundred weight were more valuable than cattle per hundred rate, a very unique instance in the history of our country. So packers began to pursue those contracts to ensure continuous supplies.

A number of the producers who had to endure the record-low experience in 1998 benefitted from those contracts because, under them, packers shared the risk of low prices with producers, and that enabled a number of those producers, to our long-term benefit, to make it through that low cycle to come back to the state today where they are, enjoying better than break-even returns on their hogs under these contractual arrangements.

Senator DEWINE. Well, listen, I want to thank all of you very much. I think it has been a very good panel. I think it has been a good hearing. I think we have explored some, I think, very interesting and important issues. And candidly, these issues are issues that this committee will look at again next year. It is unlikely that

we are going to see much legislation pass in the next couple weeks, as far as these two bills or whether these two bills will move or not, you never know. I do not predict around here, but I think that is probably unlikely. But these are two bills that will be considered again next year, and I am sure they will be reintroduced. And I think that we have raised some issues that have to be addressed. And this subcommittee will look at these issues again and take, I think, a more thorough look next year. The whole issue of transparency is something that I think this Congress has to address, and this country has to address and has to look at.

So I appreciate your testimony. Thank you all very much.

[Whereupon, at 4:09 p.m., the subcommittee was adjourned.]

SUBMISSIONS FOR THE RECORD

PREPARED STATEMENT OF THE AMERICAN COTTON SHIPPERS ASSOCIATION

The American Cotton Shippers Association is opposed to the enactment of the legislation that would impose on the cotton industry and its highly competitive marketing system the oversight of the Federal Government.

INTEREST OF ACSA

ACSA was founded in 1924 and is composed of primary buyers, mill service agents, merchants, shippers, and exporters of raw cotton who are members of four federated associations located in sixteen states throughout the cotton belt:

Atlantic Cotton Association (AL, FL, GA, NC, SC, & VA)
Southern Cotton Association (AR, LA, MS, MO, & TN)
Texas Cotton Association (OK & TX)
Western Cotton Shippers Association (AZ, CA, & NM)

ACSA member firms handle over 80% of the U.S. cotton sold in domestic and export markets in 1999–2000, domestic mills will consumer 10.3 million bales and 6.8 million bales will be shipped to foreign mills. Because of their involvement in the sale and shipment of cotton, ASCA members are directly impacted by any action of the Congress that impedes their ability to purchase the product of America's cotton producers at competitive prices. Therefore, out interest is manifest in the proposal before the Subcommittee since the pricing and marketing of US cotton is a sound and effective example of a highly competitive deregulated system that functions in the best interests of our producer, domestic mill, and export customers.

PROPOSED LEGISLATION RESTRICTS COMPETITIVE MARKETING OF COTTON

Pending legislation, S. 2252, The Agriculture Competition Enhancement Act, and S. 2411, The Farmers and Ranchers Fair Competition Act of 2000 will have an adverse impact on the marketing of cotton.

At the heart of each measure is a section [S. 2252–5(a)(2) & S. 2411–4(a)(2)] which will result in USDA regulation of cotton purchases and sales by making it unlawful for any dealer, processor, commission merchant, or broker to make or give any undue or unreasonable preference or advantage to any particular person or locality or subject any particular person or locality to any undue or unreasonable disadvantage in connection with any transaction involving any agricultural commodity.

The concerns over market concentration in sectors of the livestock industry will have the effect of regulating cotton sales and threatens a marketing structure, which over the years has provided cotton producers with an active and competitive market for the sale of cotton.

Sections 4(a)(2) & 5(a)(2) will preclude the offering of price premiums to areas of the cotton belt that produce high quality fiber with strong market demand and the establishment of discounts for poor fiber qualities in other areas. In instances of a short world supply of poorer quality fibers this could result in a premium for the lower qualities, given its world demand, over that of finer qualities produced in that or other regions of the United States. Would such market circumstances be subject to the review of USDA?

Further, this unnecessary and restrictive language precludes discounts for cotton produced and stored in areas where warehouse service is poor and delays are frequently encountered and prohibits the payment of premiums in areas where the warehouses provide timely or even immediate shipment.

This provision would also create havoc with forward contracts entered into with producers from the same region at different points in time at different fixed prices or prices determined by futures market prices. Those who contract at different times or fix the futures price in different months could be deemed to have "an unreasonable preference or advantage." The same is true for those who sell in the spot market at different points in time. All of these situations establish prices and the last

thing our industry needs is a USDA bureau determining that marketing factors "subject any particular person or locality to any undue or unreasonable prejudice or disadvantage."

We also have concerns with the restrictions on the sale or acquisition of relatively small merchant businesses, warehouses, and cotton gins with annual net sales of more than $10 million, which is equivalent to handling approximately 25,000 bales of cotton.

NO COMPELLING NEED & NO DEMAND FOR REGULATION OF COTTON INDUSTRY

This draconian reaction to the current state of the US and world farm economies resulting in large part from adverse economic conditions will do nothing more than worsen the situation. In our view there is no real or government fabricated substitute for competition.

The cotton marketing system is a proven success and a competitive model well suited for the US cotton industry. In no other section of the farm economy is the factor of competition more prevalent than in the cotton industry. There is no justification for its regulation and the producer segment of our industry has not expressed a desire that cotton be subjected to the provisions of S. 2522 or S. 2411. Therefore, we respectfully request that the Subcommittee exempt cotton and the other price supported commodities from inclusion in the proposed legislation.

PREPARED STATEMENT OF WILLIAM P. ROENIGK, SENIOR VICE PRESIDENT, ON BEHALF OF THE NATIONAL CHICKEN COUNCIL

The National Chicken Council (NCC) represents companies that produce and process about 95 percent of the young meat chickens (broilers) in the United States. These vertically-integrated firms contract with growers to raise the live birds for processing and contract with breeder farmers to supply fertile eggs for hatching. The system of production, processing and marketing is highly coordinated and operates very much in a just-in-time method. During the 1950s and 1960s the system evolved into the vertically-integrated structure that has been the standard business model for five decades. NCC believes the system has well served consumers, growers, and processors.

More than 40 vertically-integrated firms vigorously compete for domestic markets and export destinations. Innovations, new technologies, and additional methods to improve productivity have allowed consumers to enjoy chicken that is now 45 percent less expensive than in 1960 when measured in real prices.

NCC is very concerned about agribusiness antitrust bills introduced in the 106th Congress that would unnecessarily establish new premerger review processes and antitrust enforcement procedures for the agribusiness sector. Current federal antitrust enforcement has the tools and resources to address the consolidation issues in agribusiness, including vertically-integrated industries such as the chicken industry. Further, there are few, if any, reasons to focus on agribusiness when essentially all of the U.S. economy is undergoing consolidation to survive and compete. The U.S. Department of Agriculture specializes in serving and supporting agriculture. It should not become the agency for antitrust enforcement.

Certain of the bills introduced in Congress, while intending to preserve jobs and rural employment will likely have quite the opposite effect and result in unintended consequences. A merger or acquisition may be the best way to save a company, its workers, and the farmers who supply live animals to the company. Creating obstacles to mergers and requiring the sharing of proprietary business information will stall mergers and impede the flow of capital investment to the agribusiness sector needing financial resources.

Chicken consumption is now over 80 pounds per person on average and has increased every year, with very few exceptions, since 1934 when USDA first published such data. Evolving business models in the poultry industry have allowed farmers and companies the ability to meet market challenges and opportunities. That evolution is not over.

One major reason poultry companies will need to examine and re-examine their structure and size is the ever increasing move toward the globalization of poultry production and international trade. Competition to supply supermarket chains and restaurant companies is intense and growing more so as these chains and firms become even larger in scale and market power. Overseas the competition is no less intense.

Before the U.S. government burdens agribusiness with additional and unnecessary antitrust regulations and laws, Congress should very carefully consider the

costs associated and whether the expected benefits are really beneficial in the longer-term and in the global market place.

It would be inappropriate and unfortunate for agribusiness to be targeted for premerger reviews and antitrust enforcement when such special attention would not be in balance with expected benefits. Imposing these types of costs and discriminatory actions on only one sector of the U.S. economy is not justified and will prove harmful to all of agriculture and the U.S. economy.